



# Assessment of Merger Control in Chile

Report by the OECD Secretariat

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2014



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## FOREWORD

This Report reviews Chile's existing competition law relating to mergers and suggests amendments to the law on the basis of (a) international best practices, (b) the OECD report on the implementation of the 2005 recommendation on mergers and (c) issues identified in the review of Chile conducted at the time of its accession to the OECD.<sup>1</sup>

The Report assesses the main issues arising from Chile's current merger control regime and proposes recommendations for improvement under OECD standards and other international best practices. The preparation of the Report involved the review of Chile's relevant legislation, soft law and case law, as well as a fact finding exercise held in Santiago with the enforcers and stakeholders of merger control in Chile, including the Competition Authority (FNE), the Competition Tribunal (TDLC), the Supreme Court, the Ministry of Economy, businesses, consumer associations, representatives of the private bar and academic experts.

The Report consists of two parts: Part 1 describes Chile's current merger control system in its most relevant features; Part 2 identifies the main issues arising from Chile's merger control system and proposes recommendations for improvement in light of the OECD analysis and existing best practices.

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<sup>1</sup> International best practices include: OECD Recommendation of the Council on Merger Review, 23 March 2005 – C(2005)34; ICN Recommended Practices for Merger Notification Procedures (2002-2004); and ICN Recommended Practices for Merger Analysis (2008-2010). For the OECD 2005 Implementation Report: see OECD, Report on Implementation of the 2005 Recommendation: Country Experiences with the 2005 OECD Recommendation on Merger Review (2013). For the OECD Accession Review of Chile: see OECD, Competition Law and Policy in Chile: Accession Review (2010); followed by OECD, 2013 Annual Report on Competition Policy Developments in Chile, DAF/COMP/AR(2013)27, 2 October 2013.

The main recommendations in the Report focus on:

- The establishment of a merger control regime by law;
- The delineation of merger control jurisdiction through the definition of mergers, the selection a merger notification mechanism and the determination of notification thresholds;
- The establishment of a transparent, effective and timely merger review procedure, and corresponding merger review powers with the FNE and/or the TDLC;
- The provision of a consistent substantive test to assess mergers' impact on competition;
- The enforceability of merger control rules through adequate enforcement tools and sanctions.

The Report was prepared by the OECD Secretariat upon request of Chile's Ministry of Economy, Development and Tourism.

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## EXECUTIVE SUMMARY

This Report identifies and assesses the main issues arising from Chile's current merger control regime and proposes recommendations for improvement in light of the OECD analysis and existing international best practices.

The main finding of this Report is that Chile's current merger control regime lacks transparency, legal certainty and predictability, which are key elements for an effective merger control system. The main reasons of Chile's current situation are the absence of specific legal provisions on merger control, the lack of clear merger control jurisdictional criteria, the reliance on general antitrust procedures which were not designed for merger control purposes, and the absence of streamlined merger review powers between the Competition Authority (FNE) and the Competition Tribunal (TDLC).

This Report analyses these issues and suggests possible ways forward for consideration by Chile. Merger control constitutes an essential component of an effective competition system. The recommendations in this Report aim at the adoption of a more effective and transparent merger control regime in Chile.

- (1) *Merger control should be established by law as an integral part of Chile's competition law and policy.*

In Chile, merger control is not established by law. Merger control has been exercised and developed by the FNE and the TDLC, relying on general provisions of the Competition Act N° 211. The absence of legal framework may give rise to legality and consistency issues, and expose the system to legal uncertainty for enforcers, businesses and ultimately for consumers and society. As a priority, Chile's competition law and policy should therefore establish a formal and binding merger control regime by law. Merger control should be preventive, collaborative and specific in determining when a merger may have or not have anti-competitive effects. The legal framework for such analysis should be clear and precise but not excessively rigid.



It should distinguish between merger control rules that need to be established by law, where certainty and legal force are essential, and merger control rules that could be left to soft law or to the enforcement practice, where flexibility is necessary to ensure the effectiveness of the system.

The essential elements of a merger control system that should be established by law include: a definition of the types of transactions deemed “mergers” for merger control purposes; the establishment of a merger notification system, with streamlined merger review procedures and clear review powers; a substantive test for assessing mergers; specific sanctions to ensure the enforceability and effectiveness of merger control rules. Each of these essential elements requires attention under Chile’s current merger control.

- (2) *Chile should establish a clear jurisdiction over mergers, by defining what transactions are subject to merger control and by establishing a clear merger notification system.*

There is no merger control jurisdiction under Chile’s current law. The first step in designing an effective merger control regime consists in delineating Chile’s jurisdiction over mergers, which may depend on three factors: the definition of transactions which ought to be subject to merger control, the establishment of a notification system, and the determination of notification thresholds.

Regarding merger definition, the law should clarify what a “merger” is, i.e. what transactions should be subject to merger control. Full mergers (or “fusions”) and acquisitions are generally considered mergers for merger control purpose, as they create a durable structural change in the market. Merger definition criteria are especially critical to identify the transactions at the fringe – such as joint ventures and the acquisition of minority interests – that may also deserve scrutiny. Merger definition may also include criteria to establish jurisdiction over staggered transactions, which together amount to one single merger.

For mergers to be actually reviewed by an enforcer, it is necessary to establish a merger notification system, which may be mandatory, voluntary or hybrid. Currently, Chile has a *de facto* semi-voluntary notification system, where mergers can be submitted to the TDLC by the merging parties, the FNE or even third parties upon a contentious

or non-contentious action, whether pre- or post-consummation. A large number of mergers have also been detected and reviewed *ex officio* by the FNE without triggering a formal TDLC review. This voluntary notification system generates uncertainty to businesses and consumers as to whether a merger should or would ever be subject to review. This Report suggests that Chile should adopt a merger notification system that is clear, effective and timely. Given the pros and cons of voluntary and mandatory systems and given Chile's context, Chile should consider adopting either a mandatory or a hybrid notification system. A hybrid notification system could potentially extend Chile's jurisdiction to a broader range of mergers, but its relevance and effectiveness will depend on additional factors. Under either system, notifications should be done by the merging parties only.

After defining the notion of mergers and establishing a notification system, Chile should identify appropriate notification thresholds. Notification thresholds determine which specific transaction should be subject to notification either because of its size/value or because of the size/value of the merging parties' activities in the country. Notification thresholds must be determined to establish a sufficient nexus with the jurisdiction, and to filter mergers that are potentially more likely to raise competition concerns. Such criteria should be clear and equally applicable to all mergers.

- Notification thresholds should first rely on objective and quantifiable criteria, e.g. turnover or asset value (company size) and/or in the value of the contemplated merger (transaction size). To ensure a sufficient local nexus, at least the turnover or assets of the target company should be domestic.
- Notification thresholds should then be determined as to their numerical level in light of e.g. Chile's GDP, the standard size of companies operating on its territory, and the number of transactions that could be effectively reviewed. The threshold levels should be monitored and adapted over time to reflect the changing economic context of the country.

- (3) *The merger review procedure should be efficient, transparent, predictable and collaborative. Merger review powers should be clearly assigned by law to (a) competent authority(ies).*

The use and coexistence of various procedures of a general nature (e.g. consultation, adversarial, settlement) available pre- and post-consummation, have led to inefficiencies and uncertainties. Long and uncertain review periods may have a chilling effect and lead companies either to avoid notification or even to abandon (potentially pro-competitive) merger plans. Today, Chile's enforcement landscape is characterised by shared powers between the FNE and the TDLC. Both enforcers are highly qualified and can offer strengths to the merger control system. This duality, however, should not add undue complexity or delays to the merger control process. A reform of Chile's merger control regime should streamline the FNE's and TDLC's respective merger review powers, along the following lines.

First, Chile should adopt a merger-specific procedure, consisting of two phases: a Phase I for the review and clearance (with or without remedies) of unproblematic mergers and a Phase II for the assessment of mergers requiring an in-depth review because of their complexity or likelihood of anti-competitive effects. The Phase II review may lead to a clearance decision, to the imposition of remedies or to a prohibition decision. Review powers may be allocated along one of these two options:

- Option 1: Phase I with the FNE and Phase II with the TDLC;
- Option 2: Phase I and Phase II with the FNE, and judicial review by the TDLC of the FNE decision upon appeal. This option may provide for enhanced effectiveness and timeliness in the review process.

Second, whether the merger review process lies essentially with the FNE and/or the TDLC, procedural rights should be reinforced at each level, which in the merger context requires that: independence and incompatibilities be fully guaranteed by law; merger review periods be established and respected; a transparent and collaborative process be adopted especially vis-à-vis the merging parties. To ensure that merger control is preventive, the law should also establish that the review process has a suspensory effect.

These procedural reforms would allow mergers to be reviewed timely, effectively and in a predictable manner to the benefit of Chile's economy and consumers.

- (4) *Merger control should provide for a substantive test under which mergers are reviewed.*

The purpose of merger control is to assess the impact of mergers on competition and to prevent mergers with anticompetitive effects from taking place. Merger control rules should include a clear substantive test under which the impact of the merger will be assessed. Chile's Competition Act prohibits any act that has or may have anticompetitive effects, but it is silent on the test under which such anticompetitive effects are established. In their enforcement practice, the FNE and the TDLC have adopted a standard of review based on the substantial lessening of competition (the SLC test). This test, however, should be set in the law. Clear guidance should be provided, whether by law or by implementing soft law, on the qualitative and quantitative factors relevant to the enforcement of the test, and on how the analysis may vary between horizontal, vertical and conglomerate mergers. The adoption of substantive thresholds (distinct from notification thresholds) could also help identify which of the notified mergers may benefit from expedited clearance.

- (5) *Chile should adopt adequate enforcement tools and sanctions to ensure the effectiveness of the merger control system.*

An effective merger control system must include sanctions for the infringement of statutory obligations. These sanctions are distinct from sanctions for anticompetitive conduct (foreseen in article 26 of the Competition Act), and relate to the obstruction or violation of merger control rules as such, regardless of whether the merger is pro- or anti-competitive. Currently, only a sanction of imprisonment is available against the obstruction of the FNE investigation, which can only be imposed following a separate procedure in criminal court. Similarly, non-compliance with merger remedies can only be sanctioned following a separate infringement procedure to be lodged by the FNE before the TDLC. To ensure its effectiveness, Chile's merger control should provide for clear sanctions (e.g. administrative fines) and periodic penalties by law against violations of the merger process rules. Such sanctions and penalties would be particularly

relevant for: failure to notify a reportable merger, the consummation of the merger during the suspensory period, the provision by the merging parties or third parties of incomplete or inaccurate information, and non-compliance with merger remedies.

## PART 1. CHILE'S CURRENT MERGER CONTROL REGIME

### Introduction

This first Part describes Chile's current merger control.<sup>2</sup> Merger control in Chile is first and foremost characterised by the fact that it is not explicitly established by law. The main features of Chile's merger control highlighted in this first Part result from an examination of Chile's current competition law, relevant case law and soft law, and from substantive discussions held with the enforcers and stakeholders of merger control in Chile. These main features consist in: Chile's current legal framework (section 1), merger control jurisdiction (section 2), merger control powers and procedures (section 3), judicial review of merger decisions (section 4), the substantive test to assessing mergers' competition impact (section 5), and finally the enforcement tools and sanctions potentially applicable in the merger review context (section 6).

### 1. Legal framework

Competition law in Chile is governed by the Decree Law N° 211 of 17 December 1973 (hereinafter the "Competition Act"),<sup>3</sup> as last amended in 2009.<sup>4</sup> The Competition Act describes the types of acts that constitute competition

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<sup>2</sup> This Report was closed in April 2014.

<sup>3</sup> Decreto Ley N° 211, available in Spanish at: <http://www.leychile.cl/Navegar?idNorma=236106&idVersion=2009-10-11>; and in English at: [http://www.fne.gob.cl/wp-content/uploads/2012/03/DL\\_211\\_ingles.pdf](http://www.fne.gob.cl/wp-content/uploads/2012/03/DL_211_ingles.pdf). The first competition law was adopted in 1959, as part of the industrial statute N° 13.305.

<sup>4</sup> The Competition Act of 1973 was essentially amended by the Law N° 19.911 of 14 November 2003, available at: <http://www.leychile.cl/Navegar?idNorma=217122>; and the Law N° 20.361 of 13 July 2009, available at: <http://www.leychile.cl/Navegar?idNorma=1004121&idParte=8740652&idVersion=2009-07-13>.

infringements, together with applicable remedies and sanctions. It also establishes the powers of Chile's competition law enforcers: the Fiscalía Nacional Económica or national prosecutor's office (hereinafter the "FNE") and the Tribunal de Defensa de la Libre Competencia or competition tribunal (hereinafter the "TDLC").<sup>5</sup> The TDLC essentially holds decision-making powers in competition matters. It is an independent specialised court that operates under the Supreme Court's supervision. Its judges are lawyers and economists. The FNE is primarily in charge of conducting investigations. It is an independent body placed within the executive branch; it is subject to the supervision of the President of Chile and the Ministry of Economy.<sup>6</sup> It is also composed of lawyers and economists.

The Competition Act includes no specific provision on merger control.<sup>7</sup> Merger control in Chile is primarily based on the general substantive provisions of articles 1, 3 and 26 of the Competition Act and on the practice developed over time by the two enforcers. Article 1 provides that the Competition Act should "*promote and defend free competition in the markets*". Article 3 establishes that "*any fact, act or agreement that prevents, restricts or hinders free competition, or that tends to have such effects*", will be sanctioned as set forth by article 26.<sup>8</sup> The

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<sup>5</sup> Portal of the FNE: [www.fne.gob.cl](http://www.fne.gob.cl). The FNE was created in 1963; the FNE's Merger Unit was created in 2012. Portal of the TDLC: [www.tdlc.cl](http://www.tdlc.cl). The TDLC was created in 2003 (effective in 2004), to replace the Competition Commission and the Consultative Commissions established by the Competition Act in 1973. Article 2 of the Competition Act grants enforcement powers to the FNE and the TDLC, each of which plays an important role, as explained *infra*.

<sup>6</sup> Article 33 of the Competition Act. The FNE is an independent body placed within the executive branch of the government, and institutional arrangements provide for guarantees of independence in the enforcement of Chilean competition law and policy. E.g., the National Economic Prosecutor (the "Fiscal" of the FNE) is appointed by the President but he or she can only be dismissed by the President in case of manifest negligence and subject to the Supreme Court's vote.

<sup>7</sup> The term "merger" referred to throughout this Report is used in the broad generic sense, including any concentration; whether horizontal vertical or conglomerate mergers, acquisitions, JVs, etc.

<sup>8</sup> Article 26 of the Competition Act provides for three types of sanctions: "*the modification or the termination of the acts or [...] agreements that contravene the Competition Act*", "*the modification or the dissolution of the companies [...] resulting from such acts or [...] agreements*" and/or pecuniary fines.

substantive provisions of the Competition Act provide the overall goal and guidance for the development and enforcement of merger control rules in Chile. In particular, the inclusion in article 3 of acts that “*tend to have such [anticompetitive] effects*” has served as the legal basis for merger control.

An indirect reference to merger control is also found in article 18 (2) of the Competition Act, which empowers the TDLC to: “*Review and adjudicate, at the request of a party with a legitimate interest or the National Economic Prosecutor, non-contentious matters, acts or contracts, whether existing or to be executed, that could infringe the provisions of the present law, [and] determine the conditions which must be met by the said matters, acts or contracts*”.<sup>9</sup> Although not aimed at merger control specifically, this power has formally opened the door to voluntary pre- and post-merger consultation submissions to the TDLC, as explained below.

Chile is a civil law based jurisdiction, where statutory law constitutes the primary legally binding source. In the absence of legal merger control standards, the following FNE guidelines and TDLC decrees constitute the main source of substantive and procedural rules applicable to merger control in Chile.<sup>10</sup>

- The FNE Guide for the analysis of concentrations (hereinafter the “FNE Merger Guidelines”):<sup>11</sup> the FNE Merger Guidelines include two sections, a first analytical and substantive section applying to horizontal mergers and a second procedural section applying to all types of mergers, including explicitly horizontal, vertical and conglomerate mergers. This new set of guidelines adopted in 2012 takes account of the legislative amendments brought to the Competition Law in 2009

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<sup>9</sup> Article 31 of the Competition Act details the consultation procedure, whereas article 32 describes the effect of the TDLC’s approval of a merger through consultation.

<sup>10</sup> The FNE guidelines are not binding, whereas the TDLC decrees are binding within the sphere of its jurisdiction.

<sup>11</sup> FNE, “Guide for the Analysis of Merger Transactions”, October, 2012, available in Spanish at: <http://www.fne.gob.cl/wp-content/uploads/2012/10/Guia-Fusiones.pdf> and in English at: <http://www.fne.gob.cl/english/wp-content/uploads/2013/01/Guia-fusiones-traducida-final-2.pdf>. These 2012 Guidelines replace prior FNE merger guidelines of 2006.



and reflects to a large extent the recent merger practice of the FNE and recent case law of the TDLC. The FNE Merger Guidelines do not bind the TDLC or the Supreme Court, and they are without prejudice to the consultation mechanism established in article 18 (2) of the Competition Act.

- The TDLC Decree N° 12/2009 on relevant information to be provided for the preventive control of concentrations (hereinafter the “TDLC Decree on Concentrations”):<sup>12</sup> this decree provides useful indications regarding the factors examined by the TDLC to assess a merger submitted for consultation in a non-contentious proceeding under article 18 (2) of the Competition Act.<sup>13</sup>
- The TDLC Decree N° 5/2004 on adversarial and consultation procedures targeting the same facts, acts or agreements (hereinafter the “TDLC Decree on Parallel Procedures”):<sup>14</sup> this Decree was adopted following the introduction of the consultation procedure under article 18 (2) of the Competition Act. Mergers, especially consummated ones, can in fact be submitted to the TDLC under a non-contentious consultation and/or under a contentious proceeding. The Decree establishes the method followed by the TDLC to avoid parallel procedures and the risk of contradictory decisions.<sup>15</sup>

Last, the FNE and the TDLC have adopted internal rules of procedure, which apply to merger procedures. The FNE Internal Instructions for the FNE’s Enforcement Proceedings set forth procedural rules to be respected by the FNE in conducting its investigations (hereinafter the “FNE Procedural Instructions”).<sup>16</sup>

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<sup>12</sup> A court decree or “auto acordado” is a judicial instrument adopted by the courts for the administration of justice. TDLC Decree N° 12/2009 on Information relevant to the preventive control of concentrations, 20 March 2009, [www.tdlc.cl/DocumentosMultiples/Autoacordado\\_N\\_12\\_2009.pdf](http://www.tdlc.cl/DocumentosMultiples/Autoacordado_N_12_2009.pdf).

<sup>13</sup> See *infra*, section 5 on the “substantive analysis” for further detail on these factors.

<sup>14</sup> TDLC Decree N° 5/2004 on parallel procedures, 22 July 2004, [http://www.tdlc.cl/DocumentosMultiples/Autoacordado\\_N\\_5-2004.pdf](http://www.tdlc.cl/DocumentosMultiples/Autoacordado_N_5-2004.pdf).

<sup>15</sup> See *infra*, section 3 on “review procedures” for further detail on the consultation and contentious procedures.

<sup>16</sup> FNE. “Internal instructions for the National Economic Prosecutor’s office enforcement proceedings”, May 2013; the English version available at: <http://www.fne.gob.cl/english/wp-content/uploads/2013/06/Internal-Instruccions-2.pdf>.

The TDLC Decree N° 11/2008 on the Reservation and Confidentiality of Procedures recalls the principle that proceedings before the TDLC are public and sets for the exceptional circumstances in which elements of the procedure can be protected as confidential or reserved.<sup>17</sup>

Additional guidance is found in the TDLC's merger case law and in the FNE's investigation reports, all of which are published.<sup>18</sup> The TDLC in its 2013 Annual Report (hereinafter the "TDLC 2013 Annual Report"), and the Commission of Competition Experts in its report of 2012 mandated by Mr. Piñera, then President of Chile (hereinafter the "Expert Commission Report") suggested amendments to the Competition Act regarding merger control.<sup>19</sup> The political program of newly elected President Bachelet foresees the introduction of merger control rules as part of its competition and consumer protection policy, which could translate into a legislative reform in the near future.<sup>20</sup>

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<sup>17</sup> TDLC Decree N° 11/2008 on the reservation or confidentiality of information in TDLC procedures, 26 November 2008, <http://www.tdlc.cl/DocumentosMultiples/Auto%20Acordado%20N%C2%B0%2011%20Refundido.pdf>.

<sup>18</sup> The FNE's reports are periodically published at: [www.fne.cl](http://www.fne.cl); and the TDLC publishes its resolutions and rulings at: [www.tdlc.cl](http://www.tdlc.cl).

<sup>19</sup> Annual Report by the President of the TDLC, 13 May 2013, <http://www.tdlc.cl/UserFiles/P0001/File/CUENTAS%20PUBLICAS%20TDLC/Cuenta%20Publica%202013.pdf>. The Expert Commission Report "Informe de la Comisión Asesora Presidencial para la Defensa de la Libre Competencia", July 2012, is available at: <http://www.economia.cl/wp-content/uploads/2012/07/INFORME-FINAL-ENTREGADO-A-PDTE-PINERA-13-07-12.pdf>. The purpose of the Expert Commission was to review existing competition rules and to propose key amendments *de lege ferenda* to improve Chilean competition law, including merger control. In 2004, a draft amending law, Bill No. 3618-03, was presented by members of Parliament seeking to establish a system of compulsory merger notification and merger control above certain thresholds. The project has not advanced since 2004 and is therefore deemed "archived": See Senate Bill; "Regulation of company mergers and takeovers", Bulletin 3618-03, 21 July 2004.

<sup>20</sup> See Michelle Bachelet's Government Program 2014-18 on "Control de operaciones de concentración" in *Protección y defensa de los consumidores, competencia y transparencia*, available at: <http://michellebachelet.cl/programa/>, p. 61.

This Report emphasises the importance of merger control and the need to adopt a clear, binding and effective merger control regime as part of Chile's competition law.

## 2. Merger control jurisdiction

There is no statutory definition of the **types of transactions** that ought to be subject to merger control in Chile. Any transaction, including mergers, may be caught under the Competition Act (article 3) insofar as it prevents, restricts or hinders free competition, or tends to have such effects. In practice, this provision has allowed for a broad approach to the types of transactions caught by merger control. In fact, any horizontal, vertical or conglomerate merger, acquisition or joint venture, may be subject to scrutiny and the enforcers can impose corrective measures or sanctions if they find actual or potential adverse effects on competition in Chile.<sup>21</sup> Foreign-to-foreign transactions and transactions that include at least one foreign party or business may equally be caught under this effect-based approach.<sup>22</sup> No special or additional nexus with Chile (e.g., domestic assets or turnover) is required.<sup>23</sup>

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<sup>21</sup> OECD, Competition Law and Policy in Chile: Accession Review (2010), available in English at: [www.oecd.org/daf/competition/sectors/47950954.pdf](http://www.oecd.org/daf/competition/sectors/47950954.pdf) and in Spanish at: [www.oecd.org/daf/competition/sectors/47951548.pdf](http://www.oecd.org/daf/competition/sectors/47951548.pdf); and OECD, Follow-up to the Nine Peer Reviews of Competition Law and Policy in Latin American Countries (2012), available in English at: [www.oecd.org/daf/competition/2012Follow-upNinePeer%20Review\\_en.pdf](http://www.oecd.org/daf/competition/2012Follow-upNinePeer%20Review_en.pdf) and in Spanish at: [www.oecd.org/daf/competition/2012Follow-upNinePeer%20Review\\_sp.pdf](http://www.oecd.org/daf/competition/2012Follow-upNinePeer%20Review_sp.pdf).

<sup>22</sup> Ibid.

<sup>23</sup> A clear example of jurisdiction over foreign-to-foreign mergers is provided by the review in 2013 of the *Nestlé/ Pfizer* concentration: TDLC, *Nestlé/Pfizer*, AE N° 07-13, 18 April 2013, [http://www.tdlc.cl/DocumentosMultiples/Art.%2039%20n%20\\_Resoluci%20\\_07\\_2013.pdf](http://www.tdlc.cl/DocumentosMultiples/Art.%2039%20n%20_Resoluci%20_07_2013.pdf); the settlement reached between the FNE and the parties is available at: [http://www.fne.gob.cl/wp-content/uploads/2013/04/acuer\\_01\\_2013.pdf](http://www.fne.gob.cl/wp-content/uploads/2013/04/acuer_01_2013.pdf).

The Competition Act includes no exception, exclusion or exemption of the types of transactions, entities or sectors that could fall outside its scope (hence, outside merger control).<sup>24</sup>

Further guidance on the types of transactions caught for merger control purposes is provided by the FNE Merger Guidelines and the TDLC Decree on Concentrations:

- The FNE Merger Guidelines define a “horizontal concentration” as: *“the acquisition of stock, the acquisition of assets, associations and, in general, any arrangements or transactions that have as their object or effect for two or more independent economic entities to become a single entity, to make decisions in a coordinated manner, or to integrate the same corporate group.”* According to the FNE, *“this definition is grounded on economic concepts”* and directed towards *“the change in incentives that occurs when, e.g., two independent economic entities, through some contractual or factual arrangement, align their incentives in order to maximise their joint profits, diminish their level of autonomy, or alter the way in which they take competitive decisions”*.<sup>25</sup> This wide approach allows the FNE to analyse also the joint participation in a business (e.g., joint ventures), the direct and indirect acquisition of a minority interest, overlaps in the management of a competing company, etc.<sup>26</sup> The FNE Merger Guidelines do not provide details of the types of vertical or conglomerate transactions that could also attract scrutiny from the FNE.<sup>27</sup>

<sup>24</sup> Similarly, no other Chilean law provision, such as sector-specific regulations, provides for exclusion from the application of competition law. In one sector, merger notification is mandatory: the media regulation subjects transactions in this sector to the review of the FNE, which may refer the matter to the TDLC, under the Act N° 19.733, article 38.

<sup>25</sup> FNE Merger Guidelines, footnote 2. Emphasis added.

<sup>26</sup> Ibid. One joint venture has so far been notified to the TDLC, namely the alliance between Nestlé and Fonterra for the joint production and sale of certain dairy products (due to the FNE’s concerns and the structural remedies it requested, the parties eventually desisted from the operation). See TDLC, *Nestlé/Soprole*, Final resolution N° 85, 7 April 2011; and OECD 2010 Annual Report on Competition Policy Developments in Chile, DAF/COMP/AR(2011)25.

<sup>27</sup> Footnote 1 of the FNE Merger Guidelines limits itself to defining what vertical and conglomerate mergers refer to.

- The TDLC Decree on Concentrations defines a concentration as “*any fact, act or agreement, simple or complex, regardless of its legal nature, by means of which: a) a competitively independent entity merges with or acquires on a lasting basis a decisive influence in the management of another competitively independent entity, which thus ceases to exist, or b) two or more of these entities jointly participate in a venture or establish a common entity, thereby reducing in a significant and lasting manner the competitive independence of any of them.*”<sup>28</sup> Unlike in the FNE Merger Guidelines, this definition is not limited to horizontal mergers. The “decisive influence” criterion retained by the TDLC reflects Chile’s broad jurisdictional reach on mergers, although it may suggest a narrower understanding than the “change in incentive” criterion retained by the FNE as defined above.<sup>29</sup>

There are no numerical or value **thresholds** set by law to establish jurisdiction over a merger. The FNE Merger Guidelines indicate that the FNE will not investigate a horizontal merger falling below pre-determined HHI-based thresholds.<sup>30</sup> These thresholds are not jurisdictional *per se*, since they do not exclude jurisdiction or notification to the FNE. They may nonetheless be understood as substantive presumptions with jurisdictional effect: given the voluntary notification system and the likelihood that the FNE will not act against mergers below such thresholds, the merging parties (hereinafter the “Parties”) may decide not to notify their planned merger if it does not meet these substantive thresholds. These thresholds are limited in

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<sup>28</sup> TDLC Decree on concentrations, article 4 (emphasis added). The decisive influence criterion was applied by the TDLC in its resolution re: the J.V. project between Endesa and Colbun: TDLC, *Endesa/Colbun*, NC 134-0619 October 2007, <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=829>.

<sup>29</sup> The wide approach adopted towards caught transactions also results from the voluntary notification system, which essentially takes place through the consultation procedure of article 18 (2) of the Competition Act, which in turn is not strictly limited to mergers. Approximately 25% of the TDLC consultations concern mergers.

<sup>30</sup> FNE Merger Guidelines, section I.2.4. The thresholds are: (i) post-merger HHI below 1500; (ii) post-merger HHI equals or exceeds 1500 but is lower than 2500 (mildly concentrated market) and  $\Delta$ HHI is below 2500; or (iii) post-merger HHI equals or exceeds 2500 (highly concentrated market) but  $\Delta$ HHI is less than 100.

scope: they are not binding; their application is limited to horizontal mergers submitted to the FNE; and the FNE reserves itself the right to investigate mergers falling below the thresholds under one of the following special circumstances: (i) one of the Parties involved is a potential competitor; (ii) one of the Parties is an important innovator or a strong and independent competitor (a “maverick” company); or (iii) there are current or recent signs of co-ordination.<sup>31</sup>

Regarding the merger **notification system**, there is no mandatory merger control in Chile. The notification of a merger is **voluntary**: notification consists in the “consultation” set by article 18 (2) of the Competition Act, under which the Parties can submit their merger to the TDLC’s review through a non-contentious procedure. The notification can take place before or after the merger consummation. Notification is not subject to any filing fee, threshold or deadline. The TDLC is the only competent authority to approve, to condition and/or to reject a merger following a voluntary consultation.<sup>32</sup>

In practice, merger notification in Chile is not as voluntary as it seems. First, a merger that is not submitted by the Parties to the TDLC for review may be subjected to the TDLC’s scrutiny by the FNE or potentially by third parties through a consultation procedure under article 18 (2) of the Competition Act or through an adversarial procedure under article 18 (1).<sup>33</sup> This occurs where the FNE or third parties can establish that the merger may raise anticompetitive concerns.<sup>34</sup> The Competition Act foresees a 3-year period of limitation for contentious procedures, starting from the implementation of the contentious act; it is silent on timing for consultation procedures.<sup>35</sup> Second, the TDLC has in several instances (in the context of both mergers and restrictive practices) imposed as a remedy that the parties consult the TDLC with respect to any future merger.<sup>36</sup>

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<sup>31</sup> Ibid.

<sup>32</sup> See *infra*, section 3 on « review powers », subject to judicial review by the Supreme Court.

<sup>33</sup> See *infra* regarding the controversial admission of third parties with a legitimate interest to submit a merger for consultation.

<sup>34</sup> See TDLC 2013 Annual Report, op. cit.

<sup>35</sup> Article 20 al. 3 of the Competition Act.

<sup>36</sup> See *infra*, section 5 on “remedies”. E.g. Some companies in the retail and energy sectors are required by virtue of TDLC decision to consult the TDLC regarding any future merger in the sector: TDLC, *SMU/SDS*, NC 397-11, 12 December 2012,

Third, in the media sector, Chile's media regulation requires the submission to the FNE of any change in the ownership or control of mass media.<sup>37</sup> For the above reasons, notification for merger control purposes qualifies as quasi-mandatory, or at least as semi-voluntary.

The voluntary notification (consultation) by the Parties to the TDLC offers several benefits:<sup>38</sup>

- If the merger satisfies the TDLC's resolution closing the consultation procedure (which may include conditions), no further liability (i.e. no contentious or damage claim) is possible in respect of the transaction;<sup>39</sup>
- The voluntary consultation allows for cost savings, given the lower procedural costs incurred in a non-contentious review as opposed to an adversarial one;
- Formal merger approval grants legal certainty to the Parties; their business stakeholders and customers.

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[http://www.tdlc.cl/DocumentosMultiples/Resolucion\\_43\\_2012.pdf](http://www.tdlc.cl/DocumentosMultiples/Resolucion_43_2012.pdf) (confirmed by the Supreme Court); and TDLC, *Copec/Terpel*, NC 380-10, 26 May 2011, [http://www.tdlc.cl/DocumentosMultiples/Resolucion\\_34\\_2011.pdf](http://www.tdlc.cl/DocumentosMultiples/Resolucion_34_2011.pdf) (in both cases, the parties notified their transaction post-closing).

<sup>37</sup> Act on the Freedom of expression and opinion – Ley de Prensa N° 19.733, <http://www.leychile.cl/Navegar?idNorma=186049>. Preliminary notification is required where the media transaction involves a concession to operate (e.g., radio spectrum), whereas for transactions that do not, post-closing notification is required with 30 days from the consummation. Such a notification is made with the FNE, which can refer the matter to the TDLC if it raises concerns. Transactions in other regulated industries – including banking, electricity, water, telecommunication, pension fund (AFP) – require notification to regulatory agencies, other than the competition authorities. The FNE co-operates with these institutions but generally hears first of mergers in the press or from the “Material Information” published by the Securities and Insurance Authority (SVS).

<sup>38</sup> As detailed in Part 2, section 4 of this Report however, the consultation procedure also entails a number of hurdles that may deter the Parties from notifying their merger.

<sup>39</sup> Save for a change of circumstances in which case the merger may be re-examined as set by Article 32 of the Competition Act. See also Chile contribution to the OECD Roundtable on “Remedies in Merger Cases”, 2011, DAF/COMP(2011)13, <http://www.oecd.org/daf/competition/RemediesinMergerCases2011.pdf>, p. 57.

The Competition Act does not foresee the notification of mergers to the FNE, but it grants the FNE the power to conclude extra-judicial settlements.<sup>40</sup> In addition, the FNE Merger Guidelines offer the Parties the possibility to submit a planned merger to the FNE for a fast-track review.<sup>41</sup> This soft law-based procedure before the FNE is used in particular when the Parties have no doubt regarding the lawfulness of their merger plan, or when they are willing to agree on remedies. Notification with the FNE does not grant certainty on the merger however, since it does not prevent third party filings with the TDLC, as explained below.<sup>42</sup>

### 3. Review powers and procedures

The Competition Act does not provide for specific **merger review powers**. Merger control powers are shared by the TDLC and the FNE, following their respective and general competition enforcement powers under articles 2, 18, 26 and 39 of the Competition Act:

- Competition enforcement, including merger control, in Chile is primarily court-based. The TDLC is the only authority that has the power to approve, to block, to condition and/or to sanction a merger, whether in a consultation or contentious proceeding.<sup>43</sup> In practice, the TDLC has imposed a diversified range of remedies in merger cases.<sup>44</sup>

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<sup>40</sup> Article 39 (ñ) of the Competition Act on extra-judicial settlements. Section II of the FNE Merger Guidelines provides the set of procedural rules adopted by the FNE for all types of concentrations (i.e., unlike section I, section II is not limited to horizontal mergers). See also OECD, Follow-up to the Nine Peer Reviews of Competition Law and Policy in Latin American Countries (2012), op. cit.

<sup>41</sup> FNE Merger Guidelines, section II.4, in which the FNE commits to analyse the notified merger within 60 days from the formal opening of the investigation.

<sup>42</sup> See *infra*, section 3 on “review powers and procedures” for further details on notification to the FNE and the settlement procedure.

<sup>43</sup> Based on articles 3, 18 (1) and (2) and 26 of the Competition Act; the powers to approve and to prohibit are not explicitly mentioned by law however. In contrast, the FNE is not entrusted with any final decision-making power (article 39 of the Competition Act).

<sup>44</sup> See *infra*, section 5 on “remedies” for some illustrations of the conditions imposed in merger cases.



The Supreme Court held that the TDLC was not subject to any legal restraints as to the remedies it is authorised to impose to mitigate the competition risks arising from a transaction.<sup>45</sup> The TDLC may also impose on the Parties administrative fines where the consummated merger is found to violate the Competition Act.<sup>46</sup>

- Investigative powers lie with the FNE. The FNE may investigate any actual or potential infringement of the Competition Act, *ex officio* or upon a third party complaint (“denuncia”).<sup>47</sup> The FNE also acts as competition prosecutor and represents the public interest before the TDLC. In this role, the FNE may request the review of allegedly anti-competitive acts, and seek for sanctions and/or preliminary measures.<sup>48</sup> The FNE is also entrusted with the power to reach in-court conciliation and since 2009 with the power to reach extra-judicial settlements with the Parties to address competition concerns.<sup>49</sup> The FNE has used its settlement power notably in the context of merger control. Following its investigation, the FNE may settle the case with the Parties and close the investigation, or bring the case before the TDLC.<sup>50</sup> Depending on whether the transaction has already been consummated and on its anticompetitive effects, the FNE may bring the merger before the TDLC through a consultation or an adversarial proceeding, as described further below.

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<sup>45</sup> Supreme Court, 5 April 2012, Docket No. 9843-2011 (LAN/TAM case).

<sup>46</sup> Article 26 of the Competition Act.

<sup>47</sup> Articles 18 (2) and 39 (a) of the Competition Act; the FNE’s specific investigation powers are set forth in article 39 (f) to (n).

<sup>48</sup> Article 39 (b) and (c). “Prosecution” is used in the generic sense; competition law enforcement in Chile is not criminal in nature.

<sup>49</sup> Article 39 (ñ) re: extra-judicial settlements, which are subject to the TDLC’s approval; and article 22 re: in-court conciliation agreements.

<sup>50</sup> The FNE may also reopen an investigation under article 39 of the Competition Act. However, the FNE cannot challenge a merger that has been approved by the TDLC based on the same facts: see Chile’s contribution to the OECD Discussion on “Investigations of consummated and non-notifiable mergers”, 25 February 2014, DAF/COMP/WP3/WD(2014)13, [http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD\(2014\)13&docLanguage=En](http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2014)13&docLanguage=En).

Merger control in Chile can take place through several **merger review procedures**. In fact, merger control can be triggered not only by a voluntary notification by the Parties, but by the FNE or by a third party before the TDLC. In addition, the Competition Act foresees two types of procedures before the TDLC: a contentious procedure (adversarial litigation) and a non-contentious procedure (“consultation”) (section 3.1). The type of procedure depends on who initiates the procedure, and whether the request seeks the non-contentious review or rather the litigation of a merger. Furthermore, the FNE investigation and settlement powers grant the possibility of merger review process taking place before the FNE (section 3.2).

### 3.1 *Merger review by the TDLC*

A merger can be subject to the TDLC’s review, either through a consultation procedure or through a contentious procedure. Since the creation of the TDLC effective in 2004, the TDLC has issued decisions on 16 merger cases,<sup>51</sup> as detailed in the Annex to this Report.

The **consultation procedure** is governed by articles 18 (2) and 31 of the Competition Act and it is further detailed in the TDLC Decree on Concentrations. According to article 18 (2), the TDLC’s consultation consists in reviewing the submitted “*facts, acts, or contracts, whether existing or to be executed, for which it can fix the conditions to be met by the said facts, acts or contracts*”; it features the following procedural steps:

- The Parties, the FNE or third parties having a legitimate interest in the merger,<sup>52</sup> can submit the merger for consultation to the TDLC.<sup>53</sup> The TDLC cannot start a merger review *ex officio*.

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<sup>51</sup> Namely 14 consultation resolutions, one adversarial ruling and one extra-judicial settlement approval.

<sup>52</sup> Article 18 (2) of the Competition Act refers to “anyone with a legitimate interest”, there is controversy as to whether this reference includes third parties or whether it should rather be limited to the Parties only. In the LAN/TAM case, the TDLC voted in favour of third party standing on the basis of this provision, which suggests a broad interpretation of that provision. See TDLC, *LAN/TAM*, NC N° 388-11, 21 September 2011, [http://www.tdlc.cl/DocumentosMultiples/Resolucion\\_37-11.pdf](http://www.tdlc.cl/DocumentosMultiples/Resolucion_37-11.pdf) and Supreme Court, Docket N° 9843-2011, 5 April 2012, [http://www.tdlc.cl/DocumentosMultiples/Resolucion\\_37\\_Corte\\_Suprema.pdf](http://www.tdlc.cl/DocumentosMultiples/Resolucion_37_Corte_Suprema.pdf).

- A consultation procedure can take place at any time, pre- or post-merger. If filed pre-merger, the consultation procedure is suspensory by virtue of the TDLC Decree on Parallel Procedures.<sup>54</sup> If filed post-merger, the consultation allows for a non-contentious *ex post* review of the merger. To date, two mergers were submitted *ex post* by the parties for consultation; the TDLC imposed in both cases that any future transaction involving the same business be notified *ex ante*.<sup>55</sup> Under article 18 (2) of the Competition Act, the TDLC sets up the conditions (i.e. remedies) for ensuring compliance with the Competition Act. In the merger context, whether pre- or post-closing, it is understood that this provision allows the TDLC to approve the merger, to subject the merger to conditions, or to block the merger where no condition can address the merger's anticompetitive risks.
- Since the creation of the TDLC, almost all merger reviews were prompted by consultation (14 out of 16 merger reviews), including one by the FNE, one by a third party and 12 by the Parties.<sup>56</sup>
- The fact of the consultation and its content are published in the Official Gazette and on the TDLC website, except for confidential information. The non-contentious proceeding starts upon the publication of the TDLC order initiating proceedings. The FNE, the

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On the contrary, in NewsCorp/Liberty Media (share swap agreement), the TDLC rejected the consultation lodged by a third party: TDLC, NC 233-07, 28 November 2007, [http://www.tdlc.cl/DocumentosMultiples/Resolucion\\_Termino\\_52\\_2007.pdf](http://www.tdlc.cl/DocumentosMultiples/Resolucion_Termino_52_2007.pdf).

<sup>53</sup> Until 2009, the FNE could only lodge a contentious procedure against a merger. Since the 2009 amendment of the Competition Act, the FNE can also launch a consultation procedure. The FNE exercised this new power for the first time in the Alvi/D&S (supermarket) merger, a consultation procedure from which the Parties eventually desisted. See TDLC, *Alvi/D&S*, NC 383-10, 2 March 2011, [http://www.tdlc.cl/DocumentosMultiples/Resolucion\\_Termino\\_83\\_2011.pdf](http://www.tdlc.cl/DocumentosMultiples/Resolucion_Termino_83_2011.pdf).

<sup>54</sup> There is no clear legal basis for the suspensory effect laid down in article 3 of the TDLC Decree on Parallel Procedures. The suspensory effect has never been challenged and it is respected by the Parties in practice.

<sup>55</sup> TDLC, *COPEC/Terpel*, op. cit, and *SMU/SDS*, op. cit.

<sup>56</sup> See the Annex to this Report for a detailed list of the TDLC merger review cases.

authorities directly concerned, and the economic actors that, in the Tribunal's exclusive discretion, are related to the matter, must be notified of the proceeding initiation.<sup>57</sup> Within a period set by the TDLC of no less than 15 business days, all parties involved (with a legitimate interest) can submit background information.<sup>58</sup> The FNE issues an investigation report and expresses its opinion regarding the effects on competition of the proposed merger. The FNE can also propose remedies to address competition concerns, although the TDLC is not bound by the FNE's views. The TDLC must hold one hearing before adopting its resolution on the merger under consultation.

- When a merger is submitted to the TDLC for consultation, it is a one-phase process, whether the merger raises substantial issues or not, although the duration of the procedure may vary.<sup>59</sup> Consultation resolutions are not subject to any review period or deadline. Article 31 of the Competition Act establishes time limits for the various procedural steps of a consultation but they are not consistently respected by the TDLC.<sup>60</sup>

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<sup>57</sup> Article 31 (1) of the Competition Act. The “authorities directly concerned” is generally understood as referring to other national authorities, rather than to foreign competition authorities.

<sup>58</sup> During the non-adversarial (consultation) proceeding before the TDLC, the FNE, government agencies and any third party showing a legitimate interest in the matter, can comment on the planned merger, including on remedies, they can also suggest new remedies; see Chile's contribution to the OECD Roundtable on Roundtable on “Remedies in Merger Cases”, 2011, op. cit.

<sup>59</sup> Article 31 (2) and (3) foresees the possibility of a somehow expedited review procedure if the parties agree with the FNE's remedy recommendations in the course of the TDLC proceeding. In that case, the TDLC shall convene a public hearing within 15 working days, which will end the procedure. To date this procedure has been used twice in the merger context: (i) in the airline merger LAN/TAM (op. cit.); and (ii) in the telecommunication merger Radiodifusion (TDLC, *Radiodifusion SpA*, NC 404-12, 29 October 2012, <http://www.tdlc.cl/DocumentosMultiples/Resoluci%C3%B3n%20N%C2%B0%2041-2012.pdf>).

<sup>60</sup> This is true especially for the final time limit within which the TDLC should normally issue its decision. The 14 TDLC resolutions issued in merger consultations to date (statistics for this Report were closed on 31 January

The second merger control procedure consists in the **adversarial (contentious) procedure**, where the FNE or a third party (no legitimate interest required) challenges a merger before the TDLC under article 3 of the Competition Act. A contentious procedure may be lodged before or after the consummation of the transaction, although it is more likely and common post-merger. Differently from consultation procedures, the contentious procedure allows the claimant to seek not only remedies, but also sanctions (fines) against the Parties. To date, the TDLC reviewed one merger under the adversarial procedure.<sup>61</sup>

The adversarial procedure is characterised by the following features:

- The contentious proceeding is governed by article 18 (1), and articles 19 to 29 of the Competition Act, which apply to any competition infringement. The proceeding starts with a complaint or a lawsuit filed by the FNE or by a third party. The complaint or the lawsuit must describe the facts (e.g. the merger) that infringe the Competition Act and the market(s) affected by the alleged infringement. To a large extent, the contentious proceeding follows Chile's civil procedure code; it may include written submissions by the Parties and an oral hearing. The TDLC is free to impose preliminary measures pending its final ruling on the matter.
- In the course of the contentious proceeding, the TDLC may also invite the parties to settle the case ("conciliation"), subject to the TDLC's final approval under article 22 of the Competition Act. This judicial settlement faculty is only available in contentious proceedings; it ends the trial if approved by the TDLC.<sup>62</sup>
- The TDLC's final ruling in a contentious proceeding may approve the merger, declare it anticompetitive and prohibit it, or impose "*preventive, corrective or prohibitive measures*" and/or impose sanctions.<sup>63</sup> Such measures may include the termination or modification of the infringing acts or agreements and the dissolution of the entities resulting from the

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2014) lasted approximately 9 months on average. For further detail, see the Annex to this Report and the point on "review period" *infra* in this section.

<sup>61</sup> TDLC, *Chile Films IVM/Hoyts Cinemas*, C 240-12, 15 January 2013, [http://www.tdlc.cl/DocumentosMultiples/Resolucion\\_Termino\\_107\\_2013.pdf](http://www.tdlc.cl/DocumentosMultiples/Resolucion_Termino_107_2013.pdf).

<sup>62</sup> Article 22 only applies to contentious procedures laid down in article 18 (1) of the Competition Act.

<sup>63</sup> Articles 3 and 26 of the Competition Act.

infringement (i.e. unwinding the merger), as set by article 26 of the Competition Act.

- In 2012, the FNE initiated for the first time a contentious procedure against a consummated merger in the cinema industry that raised competition concerns. As part of the TDLC proceeding, the FNE reached a judicial settlement with the Parties, requiring *ex post* divestitures, which the TDLC approved.<sup>64</sup> This has so far been the only contentious merger procedure before the TDLC, which indicates that, even post-merger, the consultation procedure is the favoured channel for merger control.

Merger control procedures before the TDLC – whether in consultation or contentious procedures – are public, including written submissions and oral hearings. The principle of publicity is stated in the TDLC Decree on Concentrations<sup>65</sup> and in the TDLC Decree N°15/2012, based on article 22 of the Competition Act. The TDLC may exceptionally agree to protect information as “reserved” or “confidential”, where sensitive information or business secrets are at stake.<sup>66</sup>

The TDLC has addressed the risk of multiple procedures regarding the same facts (or merger) in its Decree on Parallel Procedures. The Decree on Parallel Procedures establishes the method for processing complaints or requests (adversarial proceeding) and consultations (non-adversarial proceeding) that concern the same facts:

- If a contentious proceeding is lodged first, a consultation regarding the same facts is not admissible (if the Parties wish to consult, they must join the contentious proceeding).<sup>67</sup>

<sup>64</sup> TDLC, *Hoyts cinemas*, op. cit.; and the judicial settlement concluded between the FNE and the Parties is available at: <http://www.fne.gob.cl/wp-content/uploads/2013/01/Acuerdo-conciliatorio-C240-12-001.pdf>.

<sup>65</sup> TDLC Decree on Concentrations, article 6.

<sup>66</sup> Reserved and confidential information, are two distinct concepts and enjoy different levels of protection. Reserved information means that the information is only accessible to the parties to the procedure (including the FNE), but not to third parties. Confidential information is granted a higher level of protection as it is only accessible to the party who submitted it, the TDLC and the FNE. See TDLC Decree 15/2012, op. cit., articles 3 and 4.

<sup>67</sup> TDLC Decree on Parallel Procedures, article 1.

- If a consultation is lodged first: (i) pre-merger, the consultation takes precedence over any subsequent contentious action (the claimant may assert its claim in the consultation procedure); whereas (ii) post-merger, a subsequent contentious claim takes precedence and transforms the consultation process into a contentious proceeding (which the preceding consulting party joins).<sup>68</sup>

The TDLC has the authority and responsibility to issue rulings, including possible remedies and sanctions, in contentious proceedings.<sup>69</sup> The TDLC resolutions in consultation procedures are declaratory and may include conditions (i.e. remedies) for the merger to be deemed compliant with the law.<sup>70</sup> The FNE is responsible for ensuring compliance with the TDLC decisions (rulings or resolutions).<sup>71</sup> In case of non-compliance, the FNE should lodge a contentious procedure before the TDLC against the infringer requesting the implementation of the initial TDLC decision.

### 3.2 *Merger review by the FNE*

The FNE is in charge of the investigation, following which the FNE submits an investigation report to the TDLC, providing its findings as to whether the merger raises competition concerns. The TDLC is not bound by the FNE's report.

Even in the absence of an open TDLC procedure, the FNE can investigate mergers, either *ex officio* or upon a third party complaint, as laid down under article 39 of the Competition Act.<sup>72</sup> Such investigations may take place pre- or post-merger. In the course of its investigation, the FNE complies with its

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<sup>68</sup> Ibid., articles 3 and 2 respectively.

<sup>69</sup> Article 26 of the Competition Act.

<sup>70</sup> Declaratory judgments are usually legally binding and preventive resolutions on the legality of the matter submitted for consultation. Although the power to prohibit the consulted act is not explicit in the law, the TDLC has prohibited mergers following two consultation procedures: TDLC, *D&S/Falabella*, NC N° 199-07, 31 January 2008, [http://www.tdlc.cl/DocumentosMultiples/Resolucion\\_24\\_2008.pdf](http://www.tdlc.cl/DocumentosMultiples/Resolucion_24_2008.pdf); and *Shell/Terpel*, NC 37/2011 (overturned by the Supreme Court on appeal, who imposed remedies instead, file N° 9843-2011).

<sup>71</sup> Article 39 (d) of the Competition Act.

<sup>72</sup> Ibid. The FNE's investigatory powers are detailed in article 39 (e) to (n) of the Competition Act.

Procedural Instructions. Where the merger under investigation is found to raise competition concerns, the FNE must initiate a consultation or a contentious procedure before the TDLC, unless it can reach an extra-judicial agreement on remedies with the Parties.

In addition to the above Competition Act provisions and procedures, the FNE Merger Guidelines allow for an informal fast-track merger review procedure before the FNE, which can be prompted only by the Parties and before the consummation of the merger (*ex ante*).<sup>73</sup> This special review by the FNE is therefore preventive and voluntary:

- To encourage such voluntary submissions, the FNE follows a collaborative approach with the Parties and commits to deliver its conclusions on the planned merger within 60 working days.<sup>74</sup> The FNE review has no suspensory effect.<sup>75</sup> The notification by the Parties is made public, whereas background information brought by the Parties or third parties can be protected as confidential or reserved.<sup>76</sup>
- The FNE assessment can lead to one of the following decisions: (i) to close its investigation with no further action, if the merger is found unlikely to entail competition risks; (ii) to enter into an extra-judicial agreement with the Parties where they agree on remedies to address the FNE's competition concerns;<sup>77</sup> or (iii) to submit the merger for

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<sup>73</sup> Section II of the FNE Merger Guidelines sets forth the procedure for the analysis of concentrations submitted to the FNE's review. Unlike section I of the Guidelines, this section II applies to all types of concentrations, including horizontal, vertical and conglomerate operations.

<sup>74</sup> Sections II.1.1 and II.4 of the FNE Merger Guidelines. The 60-day review period can be extended by joint agreement of the FNE and the Parties. Absent the issuance of an opinion by the FNE within this 60-day period, the merger is deemed not to raise competition concerns.

<sup>75</sup> The possibility for the Parties to close the deal while the merger is under review before the FNE is explicitly envisaged in the FNE Merger Guidelines, section II.1 (*in limine*), II.1.2 (*in fine*) and II.3 of the FNE Merger Guidelines. This has never happened in matters notified by the Parties but it has happened in the course of merger investigations that were launched *ex officio* by the FNE.

<sup>76</sup> Section II.1.3 of the FNE Merger Guidelines.

<sup>77</sup> Extra-judicial agreements between the FNE and the Parties are subject to the TDLC's approval in compliance with article 39 (ñ) of the Competition Act.



consultation to the TDLC, unless the Parties commit to do so themselves.<sup>78</sup> The FNE does not have the power to approve or to block a merger.

- The FNE review process offers the Parties the benefit of obtaining rapidly an official opinion on their merger plan and of settling out-of-court on remedies – instead of going through a lengthy and suspensory consultation procedure before the TDLC.
- This FNE review process however, does not foreclose procedures before the TDLC. By notifying the FNE, the Parties could face two successive review procedures (one with the FNE and one with the TDLC) if the FNE eventually decides to submit the merger for TDLC consultation, or if a third party simultaneously or subsequently lodges a consultation or a contentious procedure before the TDLC.<sup>79</sup>

Since the creation of the FNE's Merger Unit in 2012,<sup>80</sup> the FNE has investigated 38 transactions: 35 were opened on its own motion (*ex officio*) and three were lodged by the Parties. Only one merger was submitted to the TDLC for consultation; and one extra-judicial settlement reached by the FNE and the Parties was submitted to TDLC for clearance.<sup>81</sup>

A key element of the FNE's investigation consists in the possibility to reach extra-judicial agreements, a.k.a. out-of-court settlements.<sup>82</sup> This power is

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<sup>78</sup> Article II.1.1 of the FNE Merger Guidelines. Where the matter is submitted to the TDLC, the FNE's investigation continues as part of the TDLC consultation procedure.

<sup>79</sup> The FNE's conclusion plays nonetheless as a strong incentive or disincentive to third parties. To date, no third party has brought a complaint before the TDLC regarding a merger that had been investigated and closed by the FNE. In theory, the Parties could also lodge a consultation with the TDLC after and despite notifying their merger to the FNE.

<sup>80</sup> Before the creation of the FNE Merger Unit, mergers were examined by the FNE's general Investigation Division.

<sup>81</sup> See *infra* for further details on the extra-judicial settlement (Nestlé/Pfizer).

<sup>82</sup> Pursuant to article 39 (ñ) of the Competition Act, the FNE can reach extra-judicial agreements to preserve free competition in the market. Extra-judicial agreements are to be distinguished from judicial agreements, which can be reached by the

not merger-specific. The FNE can settle in the course of any investigation, including cartel and abuse of dominance investigations. Extra-judicial agreements are envisaged in the merger context when the Parties agree with the FNE on the potential risks of the merger and on the measures that should be adopted to safeguard competition in the markets.<sup>83</sup> Out-of-court settlements are subject to the TDLC's approval, normally within 20 working days from the settlement submission.<sup>84</sup> The law is silent as to what happens if the TDLC rejects the settlement.<sup>85</sup> The FNE has so far settled one merger case in the context of a foreign global transaction, which obtained the TDLC's approval.<sup>86</sup> Whether a settlement in the merger context is admissible at all, was a heavily debated question at TDLC level.<sup>87</sup>

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FNE and the Parties as part of a TDLC contentious procedure, also subject to the TDLC's final approval under article 22 of the Competition Act.

<sup>83</sup> The terms and conditions of the settlement are published in the FNE reports (except for confidential information), together with relevant public data that justify the effectiveness of the mitigating measures, i.e. remedies.

<sup>84</sup> The TDLC must hold a single hearing within 5 working days from the submission of the agreement and adopt its final decision within 15 working days from the hearing; the decision approves or rejects the agreement.

<sup>85</sup> Since the TDLC cannot act *ex officio*, a request by the FNE or a third party (encouraged by the TDLC's rejection) would be needed to open a formal TDLC procedure regarding the merger.

<sup>86</sup> In the Nestlé/Pfizer merger, the FNE reached an extra-judicial agreement with Nestlé and Pfizer in connection with Nestlé's global acquisition of Pfizer's infant nutrition business; Nestlé agreed by virtue of this settlement to sell Pfizer's infant formula to a third party. The FNE started its investigation *ex-officio* in August 2012 and the TDLC formally approved the extra-judicial settlement in April 2013: see TDLC, *Nestlé/Pfizer*, op. cit. The FNE reached an extra-judicial settlement and co-operated with foreign competition authorities that were also reviewing the merger.

<sup>87</sup> There were two questions on which the judges' vote was needed in the Nestlé/Pfizer matter: first, whether the settlement was admissible in the merger context at all (admitted by a tight majority of the TDLC judges); and second, whether the settlement in its content could be approved as sufficient to preserve competition (approved unanimously by the TDLC). Despite being referred to as a milestone decision, the varying opinions among TDLC judges on the matter triggered uncertainty among businesses as to whether any future settlement would be approved. There has been no other extra-judicial settlement since then. See also OECD, 2013 Annual Report on Competition

On the other hand, the LAN/TAM airline merger gave rise to a TDLC review procedure despite an extra-judicial settlement being reached between the Parties and the FNE as summarised below.

**Box 1: The LAN/TAM airline merger:  
An illustration of the risk of duplication of merger review procedures in Chile**

The FNE opened an *ex officio* investigation into the acquisition by LAN, Chile's national air carrier, of TAM, Brazil's air carrier, following information of their merger plan filed with the Securities Authority (SVS). The FNE and the Parties reached an extra-judicial agreement in January 2011 addressing the competition risks arising from the transaction. On 27 January 2011, a few hours before the extra-judicial agreement was submitted to the TDLC for approval, a consumer association lodged a consultation with the TDLC regarding the LAN/TAM merger plan. This third party action was considered admissible by the TDLC under article 18 (2) of the Competition Act. Accordingly, the TDLC rejected the Parties and the FNE's settlement submission and opened instead a full judicial review of the merger.<sup>88</sup> As part of the consultation proceeding, the FNE submitted its investigation report to the TDLC. The TDLC cleared the transaction by virtue of a final resolution on 21 September 2011, subject to a series of remedies.<sup>89</sup> These judicial remedies are similar to the remedies agreed on by the FNE and the Parties in the out-of-court settlement, essentially aiming to reduce the risks of entry barriers and fare increase on certain routes affected by the transaction. The TDLC's resolution was confirmed on appeal by the Supreme Court on 5 April 2012; which definitively closed the matter.<sup>90</sup>

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Policy Developments in Chile, DAF/COMP/AR(2013)27, 2 October 2013, [http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR\(2013\)27&docLanguage=En](http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR(2013)27&docLanguage=En).

<sup>88</sup> The TDLC Decree addresses instances of parallel consultation and contentious procedures before the TDLC; it does not address the instance arising from the LAN/TAM case, i.e. an FNE settlement submission (following a voluntary notification to the FNE) lodged in parallel to a consultation procedure by a third party before the TDLC.

<sup>89</sup> TDLC, *LAN/TAM*, N° 388-11 NC, 21 September 2011, [http://www.tdlc.cl/DocumentosMultiples/Resolucion\\_37-11.pdf](http://www.tdlc.cl/DocumentosMultiples/Resolucion_37-11.pdf).

<sup>90</sup> LAN and TAM had lodged an appeal against certain remedies: Supreme Court, Docket N° 9843-2011, 5 April 2012, [http://www.tdlc.cl/DocumentosMultiples/Resolucion\\_37\\_Corte\\_Suprema.pdf](http://www.tdlc.cl/DocumentosMultiples/Resolucion_37_Corte_Suprema.pdf).

As a result, mergers may end up being reviewed by the FNE only,<sup>91</sup> or by both the FNE and the TDLC successively<sup>92</sup> or even simultaneously<sup>93</sup> – depending on who launches the procedure, when, why, and before which authority.

There are no effective **review periods** established by law. Certain procedural steps are subject to the legal terms established by articles 20 to 31 of the Competition Act. Article 26 sets a maximum time limit for the adoption of the TDLC ruling, but it is generally not respected. In practice, the length of the merger review before the TDLC varies depending on whether it is conducted under a consultation or a contentious procedure. Merger consultations before the TDLC last on average 263 calendar days (approx. 9 months),<sup>94</sup> whereas contentious proceedings tend to be longer.<sup>95</sup> In addition, both types of proceedings can be appealed before the Supreme Court by any party to the TDLC procedure. To date, half of the TDLC merger decisions were subject to the Supreme Court's judicial review, which lasted 189 calendar days on average (approx. 6 months).<sup>96</sup> The Annex to this Report provides the detailed list and length of each merger procedure completed to date.

Regarding the FNE's merger review, the FNE Merger Guidelines provide that the FNE will close its investigation within maximum 60 working days from the publication of the merger notification. The FNE and the Parties can jointly

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<sup>91</sup> I.e. in cases where the FNE closes the investigation and no proceeding is lodged before the TLDC.

<sup>92</sup> I.e. in cases where a settlement is reached or where the merger is subject to a review or investigation by the FNE, followed by a consultation or proceeding before the TDLC.

<sup>93</sup> Procedural rules may in fact lead to adversarial and non-adversarial procedures being lodged simultaneously. The TDLC Decree on Parallel Procedures, *op. cit.*, addresses this risk.

<sup>94</sup> This number considers the average duration of the 14 cases of mergers reviewed by the TDLC under the non-adversarial (consultation) proceeding.

<sup>95</sup> There has only been one merger case reviewed by the TDLC under the contentious proceeding (TDLC, *Hoyts Cinemas*, *op. cit.*). Since this case ended with a judicial agreement between the FNE and the parties, there is no data to calculate the duration of a contentious merger review proceeding. However, considering all contentious cases before the TDLC (including cases of collusion, unilateral abuse, etc.), they lasted from 12 to 20 months before the TDLC.

<sup>96</sup> The Supreme Court's review of a ruling issued in a contentious proceeding could take longer, but this has not been tested yet in the context of mergers.

agree on an extension. This time limit applies only to mergers voluntarily notified *ex ante* by the Parties. The FNE's investigations launched *ex officio* or upon a third party complaint are only subject to the principle of "reasonable period" under the FNE Procedural Instructions.<sup>97</sup> The average duration of such FNE investigations is 114 calendar days (approx. 4 months).

#### 4. Judicial Review

Pursuant to articles 27 and 31 of the Competition Act, **judicial review** of the TDLC rulings and resolutions is conducted by the Supreme Court upon a special appeal ("recurso de reclamación"), which can be lodged by any of the parties to the TDLC procedure within 10 working days from the notification of the TDLC decision. In other words, there are two jurisdictional review levels, one with the TDLC and one with the Supreme Court. Key aspects of the Supreme Court's judicial review power include the following:

- The appeal does not suspend the implementation of the TDLC decision, except for the payment of fines (if any).<sup>98</sup> As to the suspension of the merger, there is no specific rule on merger standstill, but the Parties are generally reluctant to close the deal pending the Supreme Court's judgment.
- Only final resolutions and rulings by the TDLC, issued in consultation and contentious proceedings respectively, can be challenged before the Supreme Court.<sup>99</sup>
- The appeal may target any final resolution or ruling, including remedies, approval, prohibition or sanction decisions.<sup>100</sup> TDLC's approvals of settlements concluded between the FNE and the Parties can be challenged before the TDLC itself,<sup>101</sup> whereas judicial

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<sup>97</sup> The Instructions establish certain criteria to determining what a reasonable period is. See FNE Procedural Instructions, *op. cit.*

<sup>98</sup> Article 27 *in fine* of the Competition Act. The Parties may also request the suspension of the TDLC ruling to the Supreme Court.

<sup>99</sup> Intermediate decisions of the TDLC (e.g. preliminary measures) can only be challenged before the TDLC itself through an action for revision ("recurso de reposición"), article 27 al. 1 of the Competition Act.

<sup>100</sup> Article 31 of the Competition Act. Before the act amendment of 2009, approval decisions were not subject to judicial review.

<sup>101</sup> Article 39 (ñ) of the Competition Act.

settlements approved by the TDLC can be challenged before the Supreme Court.

- The history of the law indicates that the “recurso de reclamación” was meant to be administrative in nature and narrower in scope than an ordinary appeal: the recurso de reclamación would allow the court to review misapplications of the law and to exercise some discretion regarding fines imposed under the law, but it would exclude the review of the facts.<sup>102</sup> The Supreme Court has construed it broadly however, considering that it has full jurisdiction powers, i.e. it can substitute its own judgment regarding any aspect of the TDLC’s resolution or ruling, whether matters of fact, interpretations of law, standing, the imposed sanctions and/or remedies, and the sufficiency or lack of evidence.
- The Supreme Court conducts its review in light of the principles and rules laid down in the Competition Act and Chile’s Constitution.
- The appeals so far have targeted predominantly the type and the scope of remedies imposed by the TDLC.<sup>103</sup>

The FNE’s decisions are not final judicial decisions; therefore, they are not subject to judicial review by the Supreme Court. In conducting its investigations, the FNE is subject to the general duties of the public administration.<sup>104</sup>

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<sup>102</sup> At the same time, the “recurso de reclamación” was aimed to be slightly wider in scope than a pure cassation or annulment review, which would be limited to the (mis)application of the law. See National Congress debate on the Competition Act (*Discusión generada en el Congreso Nacional al tramitarse la Ley 19.911*), <http://www.leychile.cl/Navegar/scripts/obtienearchivo?id=recursolegales/10221.3/2472/1/HL19911.pdf>.

<sup>103</sup> Half of the TDLC merger decisions issued to date were subject to judicial review, one against a prohibition decision, and the others against remedy decisions. See the Annex to this Report for a detailed list of TDLC decisions that were subject to judicial review.

<sup>104</sup> Violation of these duties can be subject to limited judicial review before the TDLC, to constitutional review before the Court of Appeal, and to tort challenges before the civil courts. The constitutional review is based on article 20 of Chile’s Constitution, whereas the general tort responsibility of administrative agencies is grounded on article 38 para. 2 of Chile’s

## 5. Substantive analysis and remedies

Chilean law does not provide for a **substantive test** or for analytical criteria applicable to merger control in particular. In line with the Competition Act's general provision of article 3, the merger analysis ought to determine overall whether the merger would “*prevent, restrict or hinder free competition, or tend to produce such effects*”. The substantive test for merger control encompasses elements of both the dominance test and the SLC (substantial lessening of competition) test, although being closer to the SLC test in line with the effect-based standard of article 3 of the Competition Act. As described below, the FNE Merger Guidelines and the TDLC Decree on Concentrations provide additional guidance on the substantive test and factors used to determine whether the merger under review may bear anticompetitive effects.

As a first step, both the FNE and TDLC generally require that the relevant market(s) be defined, including relevant product and geographic market(s). Both qualitative and quantitative indicators can be used to define the relevant markets. In recent years, the FNE and the TDLC have moved from a static approach to a more dynamic and prospective assessment of the relevant markets,<sup>105</sup> favouring increasingly the use of economic evidence. In practice however, conducting economic quantitative analyses has proven difficult for the FNE and the TDLC, for the following reasons:

- The enforcers face a lack of sufficient public statistics relevant to merger control; they must heavily rely on any evidence submitted by the Parties.
- The enforcers have no power to coerce the provision of data from private parties, stakeholders or even market research companies.
- There are no specific sanctions for the provision of wrongful or misleading information.<sup>106</sup>

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Constitution: See Political constitution of the Republic of Chile, as amended and consolidated, [http://www.bcn.cl/lc/cpolitica/index\\_html](http://www.bcn.cl/lc/cpolitica/index_html).

<sup>105</sup> Chile's contribution to the OECD Competition Committee Roundtable on “Market Definition” (2012), 11 October 2012, DAF/COMP(2012)19, <http://www.oecd.org/daf/competition/Marketdefinition2012.pdf>. The FNE Merger Guidelines also indicate that the FNE takes account of the temporal dimension of the relevant market.

<sup>106</sup> Chile's contribution to the OECD Competition Committee Roundtable on “Market Definition”, *ibid.*; and Chile's contribution to the OECD

As a result, despite the importance of quantitative indicators and although being well equipped to assess such data, the FNE and TDLC have so far primarily based merger analyses on qualitative indicators.<sup>107</sup> If available, the FNE and the TDLC may also take into consideration, when appropriate, national and foreign case law, consumer polls, and data from the national statistics agency and sector regulators (e.g. regulators in the health, insurance and securities sectors). The FNE and the TDLC may also commission external market studies or hire external expert economists.<sup>108</sup>

The next step and ultimate goal of the FNE and TDLC's analysis consist in assessing the competition effects of the transaction on the relevant markets. The broad effect-based provision of article 3 leaves room for a flexible and economic approach by the FNE and TDLC. According to the FNE Merger Guidelines, a merger is deemed to infringe the Competition Act if *“it grants, reinforces or increases the capacity of the merged entity, by itself or in coordination with others, to exercise market power, or when it tends or may tend towards that.”* This occurs where *“the merged entity faces fewer competitive constraints”* post-merger, which makes it *“possible for the merged entity, in a unilateral or coordinated manner, either alternatively or together, to*

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Competition Committee Roundtable on “Economic Evidence in Merger Analysis”, (2011), 27 July 2012, DAF/COMP(2011)23, <http://www.oecd.org/daf/competition/EconomicEvidenceInMergerAnalysis2011.pdf>. In addition to the lack of coercive means to requesting information in the Competition Act, article 39 h) of the same Act provides a procedure specifically allowing any recipient of an information request from the FNE to oppose such request before the TDLC. The 2009 reform of the Competition Act increased the FNE's investigative powers, such as the power to perform dawn raids and to use wire-tapping to gather evidence, but only in the field of restrictive agreements. For example, in the D&S/Falabella merger case (op. cit.), several banks refused to collaborate in providing info and therefore opposed the FNE's requests for information before the TDLC. In addition, a market research company refused to provide (and also to sell) its market study. The TDLC upheld the company's opposition.

<sup>107</sup> Chile's contributions to the OECD Competition Committee Roundtables on “Market Definition”, op. cit., and on “Economic Evidence in Merger Analysis”, op. cit. Certain FNE reports and TDLC case law reflect their readiness to rely on economic evidence for merger control purposes: see e.g. TDLC, *D&S/Falabella*, op. cit.; TDLC, *Hoyts Cinemas*, op. cit.; and TDLC, *SMU/SDS*, op. cit.

<sup>108</sup> Article 39 k) of the Competition Act.



*increase prices, to reduce output, quality or variety of products, or to alter some other competitive variable, causing harm to consumers in a way that none of the pre-merged entities could have done separately.*”<sup>109</sup> The TDLC Decree on Concentrations indicates briefly that it assesses the *expected effects* of the merger on the *structure* of, and *competition* in, the affected markets.<sup>110</sup>

There are no exemptions or *de minimis* rules defined by law or case law regarding competitive effects. Yet, the FNE Merger Guidelines provide for a safe harbour based on concentration levels.<sup>111</sup> While the TDLC also relies on market shares, the TDLC Decree on Concentration does not require HHI data as such, nor does it provide for any specific safe harbour indications.<sup>112</sup>

The FNE and the TDLC generally weigh the anticompetitive effects of a merger against its pro-competitive efficiencies. Although the legal standard used to assess efficiencies is not always clear, both enforcers give in fact serious consideration to merger-specific efficiencies.<sup>113</sup> The TDLC case law reveals that it may examine the impact of the merger on dynamic efficiency, innovation and consumer surplus.<sup>114</sup> The Parties bear the burden of proving and quantifying efficiencies.<sup>115</sup> In practice however, because the parties often do not submit the necessary data,<sup>116</sup> efficiencies are assessed under a qualitative – rather than a

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<sup>109</sup> This substantive test is provided in the FNE Guidelines applicable to horizontal mergers.

<sup>110</sup> Section 1, e) of the TDLC Decree on Concentrations. See Part II, section 5 on the substantive analysis *infra* for a comment on the fact that the TDLC Decree refers to “relevant” and “affected” markets without drawing a distinction between the two.

<sup>111</sup> Section I.2.4 of the FNE Merger Guidelines provides for HHI-based thresholds, as described *supra* in para. 10 and footnote 28 of this Report.

<sup>112</sup> The TDLC has never explicitly relied on the FNE’s HHI-based benchmarks.

<sup>113</sup> OECD, Competition Law and Policy in Chile: Accession Review (2010), *op. cit.*

<sup>114</sup> *Ibid.* See for example, TDLC, *D&S/Falabella*, *op. cit.*

<sup>115</sup> According to the FNE Merger Guidelines, anticompetitive effects may also be compensated for by customers’ bargaining power or failing firm considerations; only customers’ countervailing power has so far been invoked as a defence by the Parties before the TDLC.

<sup>116</sup> Chile’s contribution to the OECD Competition Committee Roundtable on “Economic Evidence in Merger Analysis”, *op. cit.*

quantitative – approach, with a focus on whether the claimed efficiencies are feasible and can be effectively passed onto consumers.<sup>117</sup>

In sum, the substantive analysis performed in Chile is characterised by three factors:

- The lack of a legal set of substantive rules has left room for a flexible and economic approach towards merger review. This economic approach towards merger effects and efficiencies has allowed for pragmatic merger control enforcement where mergers are submitted for review.
- In an effort to improve legal predictability and transparency, the FNE Merger Guidelines and reports and the TDLC Decree on Concentrations and case law provide guidance, albeit not binding, as to the standards, factors and indicators used for substantive analysis purposes.
- The TDLC’s and FNE’s substantive analyses are challenged in practice by the lack of available public information and often by the insufficient or unreliable character of the data provided by the Parties.<sup>118</sup>

If the FNE or the TDLC concludes that the merger is likely to “*prevent, restrict or hinder free competition*” under article 3 of the Competition Act, they can impose remedies, as a result of two alternative procedures:

- By virtue of an extra-judicial settlement between the FNE and the Parties, subject to the TDLC’s approval,<sup>119</sup>
- By virtue of a TDLC resolution or ruling following a consultation or a contentious procedure, as described above.<sup>120</sup>

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<sup>117</sup> Ibid. A thorough examination of potential efficiencies was conducted by the FNE notably in the LAN/TAM merger review, op. cit.

<sup>118</sup> See *infra* section 6 on “sanctions” (*in fine*).

<sup>119</sup> See *supra*, section 3 on “merger review procedures” for further details on the FNE settlements.

Regarding the nature and scope of remedies, the Competition Act is silent as to the types of remedies (called “conditions”) that can be imposed following a consultation, whereas article 26 of the Competition Act describes the types of remedies (called “measures”) that can be imposed following a contentious proceeding: the amendment or termination of the act or agreement deemed to infringe the Competition Act, and the modification or dissolution of the entity resulting from the infringing act or agreement. Such measures may be imposed in the merger context. Further guidance on merger remedies is empirical and provided by the TDLC case law. Both structural and behavioural remedies have been imposed. The TDLC tends to favour structural remedies, which are viewed as easier to implement and to monitor.<sup>121</sup> Behavioural remedies have also been imposed, to complement structural remedies or where the TDLC concluded that the anticompetitive concerns could be overcome in the short term.<sup>122</sup> A wide range of structural and behavioural remedies have been imposed in horizontal merger cases.<sup>123</sup> Remedies can be imposed both pre- and post-merger,<sup>124</sup> and affect domestic or foreign assets, although the FNE has no proper means to ensure foreign co-operation on remedies.<sup>125</sup>

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<sup>120</sup> See *supra*, section 3 on “merger review procedures” for further details on the TDLC resolutions and rulings.

<sup>121</sup> Chile’s contribution to the OECD Roundtable on “Remedies in Merger Cases”, *op. cit.*

<sup>122</sup> *Ibid.* Behavioural remedies imposed so far, include transparency and non-discrimination requirements, bundling prohibition, uniform pricing obligations, and restrictions on further transactions (including mandatory notification).

<sup>123</sup> Notably in the airline (*LAN/TAM*, *op. cit.*), telecommunication (*Radiodifusion*, *op. cit.*), supermarket (*SMU/SDS*, *op. cit.*), cinema (*Cinemas Hoyts*, *op. cit.*) and oil (*Copec/Terpel*, *op. cit.*) industries. No vertical merger has been reviewed by the TDLC since its creation effective in 2004. The Supreme Court confirmed on appeal in the *LAN/TAM* case that the TDLC was not subject to any legal restraints as to the remedies it is authorised to impose to mitigate the risks to competition arising from a transaction: see Supreme Court, 5 April 2012, Docket No. 9843-2011.

<sup>124</sup> Remedies were imposed post-merger in three cases; the others were imposed pre-merger. See the Annex to this Report for a detailed illustration.

<sup>125</sup> In certain cases, the TDLC imposed remedies that were first agreed on by the FNE and the Parties through a judicial settlement (e.g. *Cinemas Hoyts* case). Cross-border remedies were notably imposed in the *LAN/TAM* resolution affecting e.g. slots at Sao Paulo airport and flight frequencies on the Santiago/Lima route.

Remedies imposed by the TDLC may be subject to judicial review by the Supreme Court upon appeal by the FNE or any of the parties to the proceedings.<sup>126</sup>

The FNE is responsible for monitoring compliance with remedies. The TDLC usually sets a timeframe within which the remedies must be complied with. The FNE may initiate proceedings before the TDLC for failure to comply with remedies.<sup>127</sup>

## 6. Sanctions

The Competition Act foresees one type of sanction – namely administrative fines – which may apply to any competition infringement under article 26 (c) of the Competition Act.<sup>128</sup> Fines can be imposed on individuals and legal entities. They are administrative in nature and may amount to maximum 20.000 annual tax units.<sup>129</sup> Article 26 (c) provides for the criteria to determine the level of the fine, e.g. the economic benefit derived from the infringement, the gravity of the illegal conduct, and the Parties' collaboration to the investigation.

There are no merger-specific sanctions. Fines under article 26 (c) can only be imposed in the merger context following a contentious proceeding under article 18 (1), if the TDLC concludes that the consummated merger has anticompetitive effects and if sanctions were sought by the claimant (the FNE or

<sup>126</sup> See *supra*, section 4 on “judicial review” for further details on the appeal procedure.

<sup>127</sup> See Infringement by US citizen Malone of TDLC remedies imposed in its Ruling No. 1/2004 (*Metropolis Intercom/VTR*), [http://www.tdlc.cl/DocumentosMultiples/Sentencia\\_117\\_2011.pdf](http://www.tdlc.cl/DocumentosMultiples/Sentencia_117_2011.pdf); the TDLC upheld in June 2013 the FNE's complaint against this remedy violation. Malone and the FNE eventually settled during the appeal proceeding (against the TDLC ruling) before the Supreme Court. Remedies were agreed on; no fine was imposed.

<sup>128</sup> This section addresses sanctions in the strict sense, namely sanctions that can be imposed for purposes of punishing the Parties for an anticompetitive act. Therefore, remedies, which may also be viewed as sanctioning an anticompetitive merger, are not covered here. See *supra*, section 5 on “remedies” for further details.

<sup>129</sup> Approximately US\$ 19.2 or €14 million; according to the FNE's information and ECB currency conversion rate of December 2013.

a third party).<sup>130</sup> So far, the TDLC has ruled in one contentious proceeding against a consummated merger in the cinema industry; the Parties settled judicially and were not subject to any fine.<sup>131</sup>

The Competition Act does not provide for periodic penalties. As a consequence, compliance with remedies – whether resulting from a consultation or contentious TDLC procedure or from a settlement with the FNE – cannot be compelled through periodic penalties. Failure to comply with remedies must be brought to the TDLC in a separate infringement procedure for sanctions to be imposed.<sup>132</sup>

The FNE and the TDLC lack coercive means to gather useful information and evidence from the Parties or third parties, whether private or public entities.<sup>133</sup> They have no power to impose sanctions on the Parties or third parties for failure to respond to a request for information or for providing erroneous, inaccurate, incomplete or misleading information.<sup>134</sup>

In sum, Chile’s current merger control has been built in practice by the FNE’s investigation efforts and by the TDLC’s case law, relying on general provisions of the Competition Act and on distinct sets of soft law principles.

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<sup>130</sup> Provided fines were requested by the FNE or the third party complainant.

<sup>131</sup> The judicial settlement was reached between the FNE and the Parties and approved by the TDLC; it sets forth a series of remedies *ex post*; see TDLC, *Cinemas Hoyts*, op. cit.

<sup>132</sup> Chile’s contribution to the OECD Roundtable on “Remedies in Merger Cases”, op. cit.

<sup>133</sup> In the FNE’s own words, “[t]he FNE has faced difficulties in obtaining data from the Parties and other third parties. In a number of occasions, they have opposed the FNE’s information requests and or delayed the submission of the requested data. When the information has been actually received, it is usually unclear”, Chile’s contribution to the OECD Competition Committee Roundtable on “Economic Evidence in Merger Analysis”, op. cit. As a consequence, the merger analysis relies to a large extent on the respondents’ good will. In light of these difficulties, the FNE reserves itself the right to revise its conclusion: see FNE Merger Guidelines, section I.1 *in fine*.

<sup>134</sup> Article 42 of the Competition Act foresees a criminal sanction of imprisonment (jail time up to 15 days) for obstructing the investigation process. This sanction, however, can only be imposed following a separate procedure to be lodged by the FNE, upon authorisation from the TDLC, in criminal court.

## **PART 2. KEY ISSUES IN CHILE'S CURRENT MERGER CONTROL SYSTEM AND RECOMMENDATIONS UNDER OECD AND INTERNATIONAL STANDARDS**

This Part 2 identifies the main issues arising from Chile's current merger control system. It provides an assessment of these issues under OECD standards and international best practices. It also lays down recommendations, which should encourage the adoption of a more effective, efficient and transparent merger control regime in Chile.

The main issues identified and examined in this Part 2 can be divided in three categories, as follows:

- The risks arising from an adverse perception of mergers and merger control (section 1).
- The legal gap in Chile's competition law regarding merger control, hence the need to establish a merger control regime by law (section 2).
- Technical and substantive issues related to:
  - Merger control jurisdiction: through the definition of caught mergers, the selection of a notification mechanism, and the determination of notification thresholds (section 3);
  - Merger review procedures and powers, including the allocation of decision-making powers between the FNE and the TDLC and due process conditions (section 4);
  - The substantive test and factors to assessing mergers (section 5);
  - Enforcement tools and sanctions (section 6).

These issues were identified following the examination of Chile's current merger control regime, as described in Part 1 of this Report, as well as following in-depth discussions with the enforcers and stakeholders of merger control in Chile.

The recommendations in this Report aim to provide possible options to establish an effective merger control regime in Chile. Most of the issues discussed in this Report are inter-dependent and any reform of the merger system in Chile should consider this interdependency to insure the *internal coherence* of the system. The essential tools for merger control improvement should therefore go hand in hand for the regime to be consistent and effective.<sup>135</sup> Where various options exist, a policy choice can be made, supported by the evaluation and recommendations set forth in this second part.

### **1. Preliminary remarks on the perception and goal of merger control**

An important underlying factor in assessing and reforming merger control consists in the perception of mergers and merger control.

Today, there is a wide perception in Chile's public opinion, among enforcers and policy makers, that every merger is a "case" to be resolved through a judiciary process by unilateral adjudication, whether pre- or post-consummation.<sup>136</sup> Chile's current merger control regime generates a negative or suspicious view towards mergers: mergers are subject to the same test and treatment as anti-competitive agreements and abuses of dominance.<sup>137</sup> It also

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<sup>135</sup> For example, reforming the notification system must go hand in hand with improved merger review procedures and review periods; setting a mandatory or hybrid notification system must go together with sanctions for failure to notify; laying down the substantive rules for merger review must be combined with the power to compel the provision of relevant information to conduct the review; etc.

<sup>136</sup> This approach results from the fact that the most well-known merger decisions in Chile address controversial mergers with anti-competitive effects that were adjudicated by the TDLC following lengthy procedures. Most TDLC merger decisions have indeed either prohibited mergers: *D&S/Falabella*, and *Shell/Terpel* (the latter prohibition was overturned by the Supreme Court) or imposed remedies for the merger to be lawful. Controversial merger cases include e.g. *D&S/Falabella*, *COPEC/Terpel*, *LAN/TAM*, *SMU/SDS*, *Hoyts Cinemas* and *Nestlé/Pfizer*. See the Annex *infra* for detailed case references and outcomes.

<sup>137</sup> Although through different procedures, since most mergers are reviewed in consultation procedures, whereas anti-competitive agreements and abuses of dominance are addressed in adversarial proceedings. See Part I of this Report for further details on merger procedures, and on the substantive test, possible remedies and sanctions equally applicable to mergers, anticompetitive agreements and abuses of dominance.

fosters a litigious approach towards merger review, by subjecting mergers to inflexible procedures, by potentially allowing third parties to lodge merger review procedures, and by limiting the involvement of the Parties to one judicial hearing where all parties, including the FNE and third parties, are present.<sup>138</sup>

A negative perception of mergers and litigious merger control has two main consequences:

- First it bears the risk of offering no room for proper remedy discussion with the Parties in consultation proceedings, and the risk of a high proportion of merger decisions being appealed before the Supreme Court under the current system.<sup>139</sup>
- Second, it may bias and distort, consciously or not, the evaluation of future reform proposals.

In most jurisdictions competition consist essentially of three main enforcement areas: the control of mergers, the prohibition of anti-competitive agreements (mainly cartels) and the proscription of abuses of dominance (or monopolisation). Anticompetitive agreements and abuses of dominance constitute infringements of competition law; they are pursued by competition law enforcers and may lead to sanctions against the responsible entities or individuals. Conversely, a merger transaction (or “concentration”) does not constitute an infringement as such. Merger transactions can be a common mechanism for companies to grow their business, to expand geographically, to reach more customers, to diversify their portfolio, to bring upon synergies, to achieve efficiencies, economies of scale and scope, to increase international competitiveness.<sup>140</sup> From a competition policy perspective, most mergers are competitively neutral and even pro-competitive by fostering e.g. consumer welfare and economic efficiency. These mergers are lawful and competition policy should not remove companies’ incentives to enter into such transactions.<sup>141</sup>

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<sup>138</sup> See *infra* under section 4 for further details on current procedures and standing of third parties.

<sup>139</sup> These consequences are addressed in details *infra* under section 4 on merger review procedures.

<sup>140</sup> These benefits were also highlighted in the Expert Commission Report, *op. cit.*

<sup>141</sup> Deterrence occurs e.g. where merger control procedures are too burdensome, uncertain or lengthy: companies may be deterred from proceeding with their



Therefore, the starting point towards mergers and merger control ought to be neutral and objective. This holds true whether merger control is conducted by the competition authority or by the judiciary.<sup>142</sup> The main goal of merger control policy is to draw a line between pro- and anti-competitive mergers, to catch the types of transactions that will most likely give rise to anticompetitive effects, to give the possibility to remedy competition concerns, and to allocate enforcement resources efficiently. Most merger control jurisdictions have adopted a preventive review mechanism. Unlike anticompetitive agreements and abuses of dominance, which are pursued *ex post*, merger control gives competition enforcers the opportunity to conduct a competition assessment before the conduct (i.e. the merger) takes place, preventing consumer harm *ex ante*. In these jurisdictions, merger control is designed to encourage, and most often to mandate, the Parties to inform the enforcer of their merger plan before its consummation. *Ex post* enforcement, if any, is clearly circumscribed and constitute a last resort if the preventive mechanism has failed.

Competition law is public law, and a law of public order, which applies in the general interest. Protecting competition dynamics, consumer welfare and economic efficiency overall is the most common goal of competition policies. Merger control should therefore be insulated from the risk of private interest games and opportunistic strategies, which may threaten pro-competitive mergers and waste public and private resources. This requires to avoid the risk of merger challenge at any time by third parties, it requires a more automatic review of the transactions likely to raise competition concerns (upon the Parties' initiative or *ex officio*), and to relegate litigation schemes to the last resort where other mechanisms have failed.

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merger plan or from publicising their merger plan, especially in voluntary merger control environments.

<sup>142</sup> The TDLC should distinguish between its regulatory or administrative jurisdiction in preventive merger control v. its jurisdiction to adjudicate infringements (*ex post*). Each type of jurisdiction may command distinct approaches, procedures and powers.

Last, merger control should be merger-specific, fact-specific and market-specific. Chile is described as a small economy with highly concentrated industries (i.e. with a few players).<sup>143</sup> These pre-existing concentration levels explain to some extent the suspicion around mergers, especially horizontal mergers, which increase concentration. While these aspects are relevant to a substantive analysis, they should be examined on objective terms and on a case-by-case basis. Not all mergers are problematic, not all industries are concentrated, and the factual context of each merger should be carefully examined as it may vary over time, especially since merger review is essentially prospective. Therefore, the analysis of mergers should not be left to negative biases over the market or industry at hand, nor should merger control be used as a tool to regulate or to correct pre-existing market failures that are not merger-specific.

In sum, prior to any merger control reform, the legislator and enforcer ought to be aware of any adverse prejudice or perception that may distort the good faith and objective appreciation of amendment proposals. The objective(s) pursued by any merger control regime should also be clear so as to adopt the most suited mechanisms, taking account of Chile's legal, institutional and economic environment.

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<sup>143</sup> World Economic Forum, *The Global Competitiveness Report*, 2013-2014, see Pillar 6 of the Key Indicators, pp. 470- 471, <http://reports.weforum.org/the-global-competitiveness-report-2013-2014/>: Chile ranks 134<sup>th</sup> out of 148 countries classified from the least to the most concentrated economy (i.e. few players and market dominance). Chile is an open economy, with low trade barriers and favourable FDI rules, but to date most of the businesses active in Chile are Chilean, it features limited foreign business ownership, *ibid*, pp. 478-481. A small economy can be defined as “*an independent sovereign economy that can support only a small number of competitors in most of its industries when catering to demand. Market size is influenced by three main factors: population size, population dispersion, and the degree of economic integration with neighboring jurisdictions*”, see Michal Gal, “Merger Policy for Small and Micro Jurisdictions”, in *More Pros and cons of Merger Control*, Konkurrensverket Swedish Competition Authority, [http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/Pros&Cons/rapport\\_pros\\_and\\_cons\\_more\\_merger\\_control\\_2012.pdf](http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/Pros&Cons/rapport_pros_and_cons_more_merger_control_2012.pdf), p. 69.

**Summary: Perception and goal of merger control**

- Mergers and merger control ought to be approached through a neutral and objective lens.
- Mergers should be perceived less as “cases” and more as common business transactions, which may have pro-competitive and/or anti-competitive effects.
- Merger control review should not have an adjudicatory nature, whether the review takes place before the competition authority or the judiciary.
- Merger control should be preventive and merger-specific; it requires a case-by-case analysis.

**2. Legal framework**

**2.1 Issues**

The first issue consists in the absence of merger control in Chile’s law. The Competition Act of 1973, as amended, does not foresee the possibility of merger control as such, nor does it refer to mergers in any explicit way.

**2.2 Assessment and Recommendations**

The absence of legal framework for merger control gives rise to *legal uncertainty* for the enforcers, for companies and ultimately for consumers and society as a whole.

At the *enforcers’ level*, the FNE and the TDLC have elaborated Chile’s current merger control system through soft law, in light of general provisions of the Competition Act.<sup>144</sup> The use of “soft law” leads to two types of issues:

- On the one hand, it raises a *legality issue*. In the absence of explicit legislative provisions on merger control, certain TDLC decrees and FNE guidelines may be considered as going beyond the will of the

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<sup>144</sup> Relevant general provisions include articles 3, 18, 26 and 39 (ñ) of the Competition Act. See Part I for further details on these provisions and on the TDLC Decrees and the FNE Guidelines.

legislator as codified in the Competition Act.<sup>145</sup> These decrees and guidelines address the need for pragmatism and effectiveness absent formal legal provisions, but their legality may be questioned in court.<sup>146</sup>

- On the other hand, it raises the *risk of inconsistency*. Since soft law is left to two enforcers in Chile, the FNE and the TDLC, there is a risk that they might adopt distinct, and over time conflicting, sets of rules.

If Chile wishes to equip itself with a transparent, effective and efficient merger control system, it should establish a formal and binding merger control regime by law. That does not mean that all aspects of merger control ought to be detailed in the law. The efficiency and effectiveness of the system may require that some margin of appreciation and adaptation be left to secondary regulations and to the enforcement practice. Since competition law enforcement is currently shared by the FNE and the TDLC, the risk of inconsistency in enforcement policies should also be addressed. One possibility would be, for example, to entrust by law a joint expert commission with the power to issue merger control rules where the law has left room for soft law guidance.<sup>147</sup>

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<sup>145</sup> Chile is a civil law-based jurisdiction. Could indeed be questioned the suspensory effect of consultations, which is only set by the TDLC Decree on Concentrations, as well as the informal fast-track merger review procedure before the FNE, which exists by virtue of the FNE Merger Guidelines.

<sup>146</sup> For example, the LAN/TAM case triggered a hefty debate as to whether third parties should be allowed to lodge consultation procedures for merger review purposes under article 18 (2) of the Competition Act; whereas the Nestlé/Pfizer case cast doubts as to whether extra-judicial agreements foreseen by article 39 (ñ) of the Competition Act are allowed in a merger review context.

<sup>147</sup> In that case, the law should make it clear who has the power to issue such guidance, and grant binding effect to such guidance on both the FNE and the TDLC in the exercise of their respective merger control powers. A joint commission could include current or former members of the FNE and the TDLC to adopt common rules and standards where relevant to both the FNE and the TDLC level: e.g. guidance on the application of the substantive test, rules on the treatment of confidential information, evaluation of the work load and notification criteria. The FNE and the TDLC could however retain separate internal rules as far as their own functioning and procedures are concerned. The main goal of setting up a joint commission consists in avoiding inconsistencies at the enforcement level, where merger control enforcement is in the hands of two separate (executive and judicial) bodies.

Second, at the *business level*, the absence of a legal framework proves damaging and costly both for companies and for the economy in general. Short of clear binding rules as to which transactions ought to be subject to review, the timing of the review process, and the applicable substantive rules, companies may be deterred from informing the FNE or the TDLC of their merger plan.<sup>148</sup> As a result, there is a whole range of possibly anti-competitive transactions that may escape merger control (“under-control”). Uncontrolled anti-competitive transactions damage competition in the markets, hence the economy and consumers.<sup>149</sup> Similarly, conservative or risk-adverse businesses may abandon certain merger projects because they cannot afford the legal uncertainties around Chile’s merger control regime.<sup>150</sup> This is costly to society where potentially pro-competitive mergers are abandoned, failing to generate synergies and efficiencies to the benefit of consumers. Conservative businesses may, in the alternative, decide to submit every merger plan, including unproblematic ones, to the FNE or the TDLC to seek clearance hence confidence that their merger will stand firm. In doing so and absent clear binding rules, they engage expenditure and time into lengthy review procedures, which may affect the viability and benefits of the merger plan altogether. Such procedures may also entail a waste of the companies’ and the enforcers’ resources if the notified merger is a genuinely unproblematic merger (“over-control”). A clear notification system, efficient procedures, review periods and substantive standards, as explained *infra* in this Report, could to a large extent avoid these risks.

Third, at *consumer level*, consumers ultimately bear the consequences of uncontrolled anti-competitive mergers, of abandoned pro-competitive mergers, and of the inefficient allocation of public and companies’ resources into unnecessary or inefficient procedures. Consumers also bear the cost of anti-competitive mergers that escape scrutiny.

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<sup>148</sup> A well-known acquisition that escaped merger control is the acquisition of Paris by Cencosud S.A. in 2005, whereby Cencosud became Chile's largest retailer and expanded its credit card business.

<sup>149</sup> In Chile, this risk may be mitigated where a merger involves quoted companies in industries highly visible to the public (e.g. retail, telecom, energy), generally located in the main economic centres (the regions of Santiago and Valparaiso), and likely to be reported in the press. The risk increases however regarding mergers that involve smaller sectors, privately-owned companies, foreign companies or companies located in remote areas of Chile.

<sup>150</sup> Abandonments have occurred in several sectors, as confirmed by corporate legal counsels and competition lawyers.

#### Summary: Legal framework

- Establish a formal and binding merger control regime by law: ensure the legal force, clarity, certainty and consistency of merger control rules for all.
- Distinguish between merger control rules and standards that need to be established by law (where certainty and legal force are essential) and merger control rules and standards that could be left to soft law (where flexibility and adaptation are necessary to ensure the effectiveness of the system).
- The legal framework must be clear and precise but not excessively rigid. To ensure legal certainty, if the power to adopt soft rules is entrusted with both the FNE and the TDLC, the law should set for mechanisms to avoid inconsistencies, e.g. by setting up a joint commission responsible for the adoption of common and coherent soft rules.

### 3. Merger control jurisdiction

The first step required in designing a merger control system is to define when there is *jurisdiction* over a merger. There are commonly three steps in determining whether a merger is subject to merger control jurisdiction and whether it will actually be examined: (3.1) the *definition of caught mergers*, (3.2) the establishment of a *notification system* and (3.3) the determination of *notification thresholds*.

#### 3.1 Definition of caught mergers

##### 3.1.1 Issues

Chile's current merger control system has so far been solely based on article 3 of the Competition Act, which prohibits “*any fact, act or agreement that impedes, restricts or hinders competition or that may tend to have such effects*”.<sup>151</sup> Therefore, the Competition Act does not include any definition of “mergers” (or “concentrations”).

<sup>151</sup> The same provision is used to pursue antitrust infringements, namely restrictive agreements and abuses of dominance. Unlike mergers, which have no reference in the law, restrictive agreements and abuses of dominance are expressly described under article 3 (a), (b) and (c) of the Competition Act.

Currently mergers are defined in both the FNE Merger Guidelines and the TDLC Decree on Concentrations, in different ways. The FNE Guidelines provide for the broadest approach by defining a merger as a “change in incentives” between formerly independent companies, which according to the FNE may also include joint ventures, minority interests and interlocking shareholding.<sup>152</sup> The TDLC Decree links the notion of merger to the acquisition of “decisive influence” over an independent company.<sup>153</sup> Neither the FNE practice nor the TDLC case law have addressed the definition of mergers any further.

### 3.1.2 *Assessment and Recommendations*

The definition of mergers is critical to establish a transparent, predictable and efficient merger control system. Defining merger transactions does not mean that all such transactions will be notified and controlled: that is for notification thresholds to determine. Nor does it mean that all such transactions raise competition concerns: only the substantive analysis of the transactions can conclude on their competitive impact. Defining merger transactions simply delineates how far merger control jurisdiction can potentially go.

The issue with Chile’s current system is that relying only on article 3 of the Competition Act amounts to putting the cart before the horse: in the merger context, article 3 is construed as incriminating a merger if is anti-competitive, but it does not say what a merger is in the first place. The FNE and the TDLC have provided some guidance in their respective guidelines and decree to fill this gap. These definitions, however, do not enjoy the legal force of the Competition Act and they are not wholly consistent with each other. The essential criteria for identifying what constitutes a merger should be should be binding *erga omnes* and defined consistently.

Criteria used around the world to define mergers are diverse and tend to include objective numerical criteria and/or more economic criteria:

- *Objective numerical criteria* commonly rely on the percentage of shares, assets or interest acquired in a previously independent company (the “target”), for example the acquisition of a 50% or more

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<sup>152</sup> For further details on how mergers are defined in the FNE Merger Guidelines, see *supra* Part 1, section 2, of this Report.

<sup>153</sup> For further details on how mergers are defined in the TDLC Decree on Concentrations, see *supra* Part 1 section 2, of this Report.

interest in the target.<sup>154</sup> Low percentages can be combined with qualitative or economic criteria to avoid catching too many unproblematic transactions. The percentage level could also vary depending on whether the transaction has a horizontal, vertical or conglomerate structure. The main risk with purely numerical criteria is that they may be gamed by companies who can structure transactions to fall just below the percentage.

- *Economic criteria* are rather qualitative and focus on the corporate influence acquired over the target. Merger control regimes that have adopted economic criteria vary as to the level or type of influence required for a transaction to be subject to merger control – e.g. the acquisition of “control”, “decisive influence” or “competitively significant influence”. Economic criteria are more likely to avoid the risk of gaming, but they require some case-by-case interpretation and follow-up guidance on concepts such as “control” or “influence”.<sup>155</sup>

Full mergers (or “fusiones”) and acquisitions generally raise no doubt as to whether they should be caught by merger control, for that they induce a durable structural change in the market place. Merger definition criteria are rather of critical use to identify the transactions at the fringe – such as joint ventures, partial acquisitions or even minority interests – that may also deserve scrutiny. As a result, in selecting the criteria to define mergers, each jurisdiction faces the challenges of avoiding to catch too much (“type I errors”) or too little (“type II errors”) of the world of transactions, and of ensuring an efficient allocation of its enforcement resources. That requires that each jurisdiction take account of the reality and features of its economy, industries and most likely problematic transactions.

A merger control reform represents an opportunity for Chile to reflect on and to determine the scope of its jurisdiction over potentially harmful transactions. To that end, it should strike a balance between the desire to review all or most of the potentially harmful transactions, and the need to keep the

<sup>154</sup> Such percentages (i.e. how much of a target company is acquired) should not be confused with notification thresholds (to establish a sufficient nexus with jurisdiction), nor with substantive thresholds (to determine the merger’s competitive effects).

<sup>155</sup> For further analysis of the various criteria commonly used to define mergers, this Report refers to the OECD Background Note of 2013 on the « Definition of Transaction for the Purpose of Merger Control Review », <http://www.oecd.org/daf/competition/Merger-control-review-2013.pdf>.



review process manageable and the cost reasonable for all sides involved.<sup>156</sup> The result should consist in setting objective, clear and transparent criteria, in light of its overall economic and competition enforcement landscape. In doing so, there is no one-size-fits-all definition; the following questions and observations may help however strike the balance in defining mergers:

- Opting for a *restrictive* definition of mergers – e.g. based on the acquisition of “control” (*de jure* or *de facto*),<sup>157</sup> “decisive influence” or majority interests – entails the risk of type II errors. To avoid under-enforcement, the question is whether problematic transactions that do not fall under this definition could otherwise be caught by alternative competition enforcement tools.<sup>158</sup> If not, a broader merger definition or additional competition rules may be needed if such problematic transactions are found to deserve scrutiny.
- Opting for a *broader* merger definition – e.g. based on the acquisition of a “material influence” or “competitively significant influence” or the acquisition of an interest lower than 50%<sup>159</sup> entails the risk of type I errors. To avoid over-enforcement, a broad merger definition can be used in combination with:
  - Additional merger definition criteria that would establish a structural change in the relationship between the companies;
  - A high notification threshold: in that case, the enforcer may assert jurisdiction over such broadly-defined mergers, but it will not

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<sup>156</sup> Ibid.

<sup>157</sup> A change of “control” on a lasting basis is the criterion for merger control in the European Union: Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the “EU Merger Regulation”), <http://ec.europa.eu/competition/mergers/legislation/regulations.html>, article 3.

<sup>158</sup> For example could the acquisition of strategic assets or the creation of collaborative joint ventures, that do not confer control but may prove anticompetitive, be caught under the prohibition of restrictive agreements or exclusionary practices (through *ex post* antitrust enforcement)? Could a separate offense or control mechanism be created for problematic acquisitions of minority interest?

<sup>159</sup> Canada, Germany, Japan, the United Kingdom and the United States are among the jurisdictions that have adopted a broad merger definition.

systematically review them all (see *infra* under section 3.3 on notification thresholds); or

- Substantive thresholds or safe harbours: in that case, the transaction may be caught and notified, but it could benefit from an expedited clearance procedure if it falls below the substantive thresholds (see *infra* under section 5 on the substantive test).
- In defining mergers, a central question is whether transactions at the fringe are critical to the country’s competition enforcement policy and, if so, whether they should fall under merger control. Such transactions include essentially joint ventures and the acquisition of minority or interlocking interests:
  - Regarding joint ventures, jurisdictions that have adopted a broad merger definition generally do not treat joint venture differently from plain mergers, whereas more restrictive jurisdictions have commonly adopted joint venture-specific criteria.<sup>160</sup> Where joint ventures escape merger control, the question is whether the JVs that raise anticompetitive concerns can be caught under general antitrust rules (e.g. as restrictive agreements).
  - As to the acquisition of minority interests, “[i]t is well understood today that under certain conditions minority shareholdings can have anticompetitive effects”.<sup>161</sup> Certain jurisdictions have decided to subject minority acquisitions to merger control: to that end, they have drawn a line by relying on numerical criteria (e.g. the acquisition of a 25% interest or less)<sup>162</sup> or on a flexible economic criterion (e.g. the acquisition of a “competitively significant influence” or “significant interest”).<sup>163</sup> On the contrary, the

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<sup>160</sup> For example, EU merger control applies to joint ventures provided they lead to a “full function” autonomous economic entity.

<sup>161</sup> OECD Policy Roundtables, « Definition of Transaction for the Purpose of Merger Control Review », op. cit.

<sup>162</sup> Brazil, Germany and Japan are among the jurisdictions that have adopted low numerical thresholds, sometimes in combination with additional factors. For example, in Japan, the 20% share acquisition may be caught if the acquirer alone thereby becomes the largest shareholder.

<sup>163</sup> Purely passive interests, namely the acquisition of an interest exclusively for financial or investment reasons, are generally excluded.

acquisition of minority interests escape merger control in jurisdictions that rely on high numerical criteria (e.g. the acquisition of a 50% interest or more) or on restrictive economic criteria, such as the acquisition of “control” (unless the minority interest is deemed to confer *de facto* control). The main question for the latter is whether minority shareholdings ought to be caught at all and, if so, under what regime: merger control, general competition infringements, specific *ad hoc* provisions addressing the said transactions, or traditional antitrust enforcement?<sup>164</sup> *Ad hoc* provisions or an extension of the outreach of merger control may be relevant if there is a sense of “enforcement gap” towards problematic structural links. In other words, if Chile opts for a

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As observed by the OECD Report, “*there is not a great deal of confidence that alternative enforcement instruments can effectively reach transactions that are somewhere at the ‘fringe’ of merger review and regularly intervene against those that may have anticompetitive effects*”, OECD, Policy Roundtables, « Definition of Transaction for the Purpose of Merger Control Review », op. cit. In fact, the FNE recently published a study on minority shareholding and interlocking directorates: FNE Merger Unit, *Participaciones minoritarias y directores comunes entre empresas competidoras*, November 2013, <http://www.fne.gob.cl/wp-content/uploads/2013/11/Participaciones-minoritarias.pdf>. In the European Union, the European Commission is considering whether to extend the scope of its merger control jurisdiction or whether to tackle minority interests separately under its competition policy: European Commission Public consultation and Staff Working Document, “Towards more effective EU merger control”, [http://ec.europa.eu/competition/consultations/2013\\_merger\\_control/index\\_en.html](http://ec.europa.eu/competition/consultations/2013_merger_control/index_en.html). In the United Kingdom, the OFT commissioned a research report on the same topic and concludes that competitive harm could arise as a result of minority interests held in competitors on the basis of various theories of harm: OFT, *Minority Interests in Competitors*, March 2010, [http://oft.gov.uk/shared\\_oft/economic\\_research/oft1218.pdf](http://oft.gov.uk/shared_oft/economic_research/oft1218.pdf). In the United States, the FTC, the DOJ and the Supreme Court have consistently held that partial acquisitions (including minority shareholding) were caught under section 7 of the Clayton Act, 15 U.S. Code § 18 – Acquisition by one corporation of stock of another, <http://www.law.cornell.edu/uscode/text/15/18>; the 2010 merger guidelines, have confirmed this approach by including a new section on the review of partial acquisitions; see DOJ and FTC’s Horizontal Merger Guidelines, 19 August 2010, <http://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.

restrictive approach to focus on plain mergers, nothing prevents the adoption and enforcement of separate competition law provisions against these transactions provided they are deemed to deserve scrutiny in Chile. Either way, the law must be clear as to whether transactions at the fringe may be caught. In addition, clear guidelines and/or decisions at the enforcement level should corroborate how the legal provisions are construed in practice.<sup>165</sup>

- Guidelines could also clarify that merger control may apply to *horizontal, vertical and conglomerate mergers* under the same merger definition criterion (e.g. significant influence).<sup>166</sup> Chile’s current merger control practice has so far primarily focused on horizontal mergers, i.e. mergers among competitors, but the definition of caught mergers can raise public awareness altogether that a merger can be caught regardless of whether it is contemplated among competitors, among companies active at different levels of the supply chain or in distinct industries.
- The determination of whether a transaction meets the merger definition typically involves a one-time transaction. In certain cases however, a company may decide to acquire a target’s business piece by piece, through multiple small transactions. Whether the goal of such strategy is to escape merger control or not, the jurisdictional scope of merger control may include a timing factor, namely a *timeframe* within which jurisdiction can be exercised over successive transactions if, taken as whole, they meet the merger criteria.<sup>167</sup>

<sup>165</sup> For further analysis of the competition enforcement questions arising from minority shareholdings, this Report refers to the OECD Policy Roundtable of 2009 on “Antitrust issues involving minority shareholdings and interlocking directorates”, DAF/COMP(2008)30, 23 June 2009, <http://www.oecd.org/daf/competition/mergers/41774055.pdf>.

<sup>166</sup> Vertical and conglomerate mergers may also raise anticompetitive concerns under certain circumstances, and therefore require scrutiny. This is especially true for a small economy like Chile, where concentration levels are high in specific markets, but also where a small group of economic entities control a large part of the overall economic activity, through conglomerate groups or holdings active in several markets.

<sup>167</sup> For example, in a jurisdiction based on the acquisition of “control”, the law may indicate that the successive acquisition of minority interests are deemed a merger if within two years, the sum of these interests exceeds 50% of the

There are no statistics of the total or average number and types of transactions that occurred in Chile.<sup>168</sup> Mergers, hence merger control, may nonetheless be broadly defined, without fearing to lead to too many merger reviews. The actual workload depends rather on the notification system and thresholds, which determine among “caught mergers” the ones that will actually be subject to merger control. Merger control jurisdiction may nonetheless require adjustments and improvements over time, in light of the country’s economy, business reality and merger control experience.<sup>169</sup>

**Summary: Concept of caught transactions**

- A merger control system requires a definition of what types of transactions (“mergers”) fall under Chile’s jurisdiction.
- The essential criteria of merger transactions should be binding *erga omnes* and defined consistently. Once merger jurisdiction is delineated by law, enforcers may provide additional guidance through case law and guidelines.
- Full mergers (or “fusions”) and acquisitions generally raise no doubt as to whether they should be caught by merger control, for that they induce a durable structural change in the market place.
- Merger definition criteria are rather of critical use to identify the transactions at the fringe – such as joint ventures and the acquisition of minority interests – that may deserve scrutiny.
- Criteria used around the world to define mergers are diverse and tend to include objective numerical criteria and/or more economic criteria.
- The jurisdictional scope of merger control may include a timeframe to establish jurisdiction over successive transactions which together amount to a merger.

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target. “Creeping acquisitions” refer to a chain of acquisitions over time which may not individually raise concerns, but may do so collectively.

<sup>168</sup> Only limited information is available for quoted companies based on mandatory filings with the Securities and Insurance Authority (SVS). The National Institute of Statistics (INE) and the Tax Authority (SII) in Chile do not compile a record of transactions and most of their statistics are treated as confidential.

<sup>169</sup> To that end, a merger control reform in Chile could set forth mechanisms to gather statistics of the number and types of transactions that occur in Chile, to evaluate *ex post* whether the jurisdictional scope is meaningful, and to revise it where needed to encompass more or less transactions depending on their relevance to Chile’s merger control policy and economy.

### 3.2 *Notification system*

#### 3.2.1 *Issues*

A central issue emerging from Chile's current merger control regime consists in the notification mechanism, i.e. the mechanism by which a merger is brought to the attention of the enforcer to be reviewed and remedied if competition concerns arise. There are five types of issues arising from Chile's current notification mechanisms.

- First, there is no merger notification system under Chile's current law. Only general rules and procedures of the Competition Act provide palliative legal bases and channels to merger notification.
- Second, there is no unique merger notification process. Merger notification can take place through multiple channels, formally or informally, based on the Competition Act or on soft law, and before the TDLC or the FNE.<sup>170</sup>
- Third, merger notification in Chile is commonly described as voluntary. However, a merger can be "notified" by the Parties under the voluntary notification system (TDLC consultation or FNE filing), but also upon initiative from the FNE or third parties (upon consultation or contentious actions), as shown in Box 2 below.<sup>171</sup>

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<sup>170</sup> In fact, merger notification can be prompted in three different ways: before the TDLC through either a consultation or an adversarial procedure under article 18 (2) and (1) respectively of the Competition Act; and before the FNE through filing under its Merger Guidelines. The risk of parallel adversarial and consultation procedures has been resolved by the TDLC Decree on Parallel Procedures, *op. cit.*, but the risk of parallel or simultaneous FNE and TDLC procedures remains, since the informal filing process with the FNE does not foreclose consultation or adversarial procedures with the TDLC.

<sup>171</sup> Before the TDLC: consultations can be lodged by the Parties, but also by the FNE or a third party having a legitimate interest as shown by the LAN/TAM case; whereas adversarial procedures can be lodged by the FNE or any third party, as illustrated by the Hoyts cinema case. Before the FNE: a merger review can be notified by the Parties or be prompted *ex officio* by the FNE.

**Box 2. Statistics of merger reviews by the TDLC and the FNE**

**Merger reviews by the TDLC:** Since the TDLC creation in 2004, 19 mergers were submitted to the TDLC for review.<sup>172</sup> 17 consultations, one adversarial procedure and one settlement procedure. Out of the 17 consultations, 13 were lodged by the Parties and four by the FNE. The Parties withdrew their merger plan in three of the four consultations launched by the FNE. A number of the consultations lodged by the Parties were so upon threats from the FNE or from third parties that they would act against the merger or because notification by the Parties was imposed as a condition in prior TDLC decisions.

**Merger reviews by the FNE:** Since the creation of the FNE's Merger Unit in 2012, 38 mergers have been reviewed to date, only three of which were submitted by the Parties. Between 2007 and 2011, 66 mergers were reviewed *ex officio* by the FNE.<sup>173</sup> A substantial part of the FNE Merger Unit's resources are spent on screening the press to detect mergers, announced or consummated, that may deserve scrutiny.<sup>174</sup>

- Fourth, the FNE and the TDLC have adopted separate guidelines and decree on the type of information to be provided by the Parties as part of their notification or consultation.<sup>175</sup> There is no unique set of standards on how a merger ought to be notified; and no guidance on possible pre-notification or pre-consultation exchanges either with the FNE or with the TDLC.<sup>176</sup>

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<sup>172</sup> Statistics for the TDLC were closed on 31 January 2014.

<sup>173</sup> Statistics for the FNE were provided by the FNE and closed on 31 January 2013. No statistics are available before 2007 for the FNE. The FNE Merger Guidelines, which allow for voluntary notification by the merging parties were only adopted in 2012. Therefore, before 2012, all FNE merger investigations were opened on its own motion.

<sup>174</sup> Approximately 20% of the FNE's Merger Unit resources are spent on screening the press to detect mergers, whereas the remaining 80% of its resources are spent on investigating those detected mergers to determine whether they raise competition concerns.

<sup>175</sup> FNE Merger Guidelines (re: horizontal mergers) and TDLC Decree on Concentrations.

<sup>176</sup> In practice, the Parties' involvement is often limited, since most FNE reviews are launched *ex officio* and since, at the TDLC level, even where a

- Last, most stakeholders – including members of the FNE and the TDLC, representatives of businesses and consumers, and independent competition law experts – tend to agree that the current so-called voluntary notification system does not work. At FNE level, very few mergers were proactively notified by the Parties, mainly due to the fact that a merger review by the FNE does not prevent a TDLC procedure on the same merger. At the TDLC level, third parties have been granted standing to submit a merger for consultation, notably to incentivise or to indirectly force so-called “voluntary” merger submissions to the TDLC.

### 3.2.2 *Assessment and Recommendations*

According to the OECD Recommendation, merger review should be effective, efficient and timely.<sup>177</sup> Merger control requires some form of notification system to bring transactions to the enforcer’s attention in the first place. To that end, Chile should firstly select a notification mechanism (mandatory, voluntary or hybrid) and secondly lay down notification features needed for its notification mechanism to be effective, efficient and timely.

***Mandatory v. voluntary notification.*** A central issue to be addressed when defining a merger control policy is whether the notification of mergers should be mandatory, voluntary or a combination of both. Either way, clear and objective criteria must be laid down to establish whether and when a merger must be notified (in a mandatory system), or whether and when the merger qualifies for actual review (in a voluntary system).<sup>178</sup> The choice of a notification system may depend on the legal, institutional and economic environment of each jurisdiction. In reforming its merger control, Chile should determine whether the current pitfalls of its voluntary system would be better addressed by revising and improving the voluntary system, or rather by

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consultation is launched by the Parties themselves, they are treated like any other party to an adjudicatory TDLC procedure.

<sup>177</sup> OECD Recommendation of the Council on Merger Review, 23 March 2005 – C(2005)34, <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=195&InstrumentPID=191&Lang=en&Book=False>, (hereinafter the “OECD Merger Recommendation”), article I.A.1.

<sup>178</sup> *Ibid.*, recommendation I.A.1.2.ii.



introducing a mandatory or hybrid notification system. In making that choice, the following remarks should be considered:

- Comparative merger control law shows that, whether for policy, economic or pragmatic reasons, merger notification systems worldwide are predominantly mandatory. Only a handful of jurisdictions have adopted and kept a voluntary notification system.<sup>179</sup>
- Historically, Chile opted for a voluntary system on the pragmatic assumption that it was a small economy with a few players in each industry, who could be trusted to conduct a self-assessment of their transactions and to come forward where merger control was desirable. The point is that in practice it has not worked as expected. Very few consultations are submitted to the TDLC and most of the FNE merger investigations are opened *ex officio*. In addition, judicial developments reveal that, because the voluntary system has failed, merger reviews have been compelled through indirect channels: e.g. by granting standing to third parties to submit mergers for review, and by imposing as a merger remedy in various decisions, the mandatory notification of subsequent transactions.<sup>180</sup> Chile's current notification system is therefore semi-voluntary. Any reform should consider that today agencies and parties have recourse to indirect or unpredictable ways to counter an ineffective or unclear notification system.
- Voluntary systems generally generate lower notification rates and have lower enforcement costs associated with merger control. In Chile however, the flaws of the current voluntary system have entailed significant costs of three types: (i) The uncertainty of the system, including the length and the risk of successive FNE, TDLC and/or Supreme Court review procedures, has proven costly for all parties involved, including the Parties, third parties, the FNE and affected consumers;<sup>181</sup> (ii) A substantial part of the FNE Merger Unit's

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<sup>179</sup> E.g. Australia; Hong Kong, China; New Zealand; Singapore and the United Kingdom.

<sup>180</sup> The TDLC 2013 Annual report confirms that the current merger control system is "not as voluntary as it seems", 13 March 2013, op. cit., p. 11.

<sup>181</sup> For instance, the consumer association that lodged a consultation for the TDLC to review the LAN/TAM merger plan incurred substantial legal and procedural costs. The TDLC merger consultation resolution decides on the

resources are spent on screening public information to detect transactions, whether *ex ante* or *ex post*, that may require scrutiny and on gathering further information from (often reluctant) parties to be able to conduct its merger investigation;<sup>182</sup> (iii) There is an unmeasurable cost to society from all the potentially anti-competitive mergers that escaped scrutiny. The benefits of a voluntary system cannot be achieved where the system is not sufficiently effective and predictable. As listed Box 3 below, there are a number of conditions to be met for a voluntary system to work, which currently are not satisfied in Chile.

- A voluntary notification system also heavily relies on businesses' knowledge of merger control rules and on their ability and willingness to "play the game".<sup>183</sup> The question is whether improving Chile's current voluntary system, e.g. by setting up a clear merger control regime and by improving the efficiency of the process, would be sufficient for the system to work anyway.<sup>184</sup> Setting up a mandatory or hybrid notification system can alleviate this concern: new legal obligations, together with the risk of sanction for failure to notify, enhance business awareness and are more likely to incentivise business to report mergers.
- The main concern generally associated with a mandatory system is that it would increase the number of notifications and the enforcement

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merger; it does not order any cost recovery or reimbursement. The only benefit to the third party claimant is to obtain remedies or a prohibition decision against an anti-competitive merger. See *infra* under section 4 on review procedures for further details.

<sup>182</sup> See *supra* footnote 173 on the allocation of the FNE's Merger Unit resources.

<sup>183</sup> Absent business awareness, the system must solely rely on the enforcer's screening and information gathering resources. The system could also rely on third party denunciations but that requires antitrust awareness on their part, too.

<sup>184</sup> All merger consultations filed to date with the TDLC were initiated by large companies based in the Santiago area – where both the FNE and the TDLC are located and where transactions are regularly reported in the mainstream press. Even then, a major merger, Cencosud/Paris, escaped merger control in 2005. *A fortiori*, it is unclear whether smaller businesses and companies active in Chile's remote regions would ever conduct a merger assessment if the system remains voluntary and if their merger is unlikely to be seen in the capital.

costs. Such costs however, depend primarily on notification thresholds<sup>185</sup> and information requirements, rather than on the compulsory nature of the system as such. An increase in the enforcer's merger review resources can be covered in various ways: first, moving from a voluntary to a mandatory notification system may simply involve a shift of the inquisitorial screening resources to reviewing mandatory filings; second, a filing fee may be imposed as part of the new notification system;<sup>186</sup> and third, considering the possibility of an extra budget to the enforcer where feasible. In addition, in pursuing social welfare, not only enforcement expenditure matters, but also the costs and benefits accruing to society as a result from a given notification system. Costs to society can arise e.g. from failing to control anticompetitive transactions, from spending too much on unproblematic transactions, from unclear criteria deterring or delaying merger control, from screening too much, or from reviewing a merger for too long.

The below box summarises and compares the minimum conditions required for a **mandatory** and a **voluntary** notification system to be operational, notably in light of the OECD Merger Recommendation and other international best practices.<sup>187</sup> The table also highlights the main pros and cons of each notification system.

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<sup>185</sup> See *infra* under section 3.3.

<sup>186</sup> The filing should be reasonable and not so high as to deter companies, especially small and medium-sized ones, from notifying their merger. Still, a filing fee represents a lower financial burden on companies than lengthy and uncertain procedures which involve significant legal, procedural and operational costs under Chile's current voluntary regime. It must also be lower than sanctions for failure to file under a mandatory regime.

<sup>187</sup> OECD Merger Recommendation, *op. cit.*; and ICN Recommended Practices for Merger Notification Procedures (hereinafter the "ICN Recommended Practices"), <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf> (also available in Spanish at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc589.pdf>).

**Box 3. Comparison of merger notification systems**

Notification systems	Mandatory	Voluntary
<b>Conditions</b>	<ul style="list-style-type: none"> <li>• Clear and objective criteria to determine when a merger must be notified, including appropriate notification thresholds (which triggers notification).<sup>188</sup></li> <li>• Reasonable information requirements.</li> <li>• <i>Ex officio</i> powers and sanction against failure to notify.</li> </ul>	<ul style="list-style-type: none"> <li>• Clear and objective criteria to determine whether a merger qualifies for review, especially a clear substantive test (which triggers notification).</li> <li>• Reasonable information requirements.</li> <li>• Businesses' antitrust awareness.</li> <li>• Sufficient screening resources.</li> <li>• <i>Ex officio</i> powers against anticompetitive mergers.</li> <li>• Sufficient likelihood and visibility of merger control enforcement.</li> </ul>
<b>Pros</b>	<ul style="list-style-type: none"> <li>+ Does not rely on businesses' own substantive assessment, brighter line with notification thresholds determining notifiability of mergers.</li> <li>+ Allows to concentrate enforcement resources on merger review, rather than on merger detection.</li> <li>+ Higher potential to prevent anti-competitive mergers occurring in non-transparent or private industries.</li> <li>+ Raises overall antitrust awareness.</li> <li>+ Legal certainty.</li> </ul>	<ul style="list-style-type: none"> <li>+ Potential to focus on problematic or complex mergers, since the trigger for notification is a substantive merger assessment.</li> </ul>
<b>Cons</b>	<ul style="list-style-type: none"> <li>- Highly dependent on notification thresholds.</li> <li>- Risk of notification resources being spent on unproblematic mergers (type I errors).</li> </ul>	<ul style="list-style-type: none"> <li>- Highly dependent on businesses' antitrust awareness and enforcers' screening tools.</li> <li>- Triggered by, and highly dependent on, companies' own substantive assessment.</li> <li>- Higher risk of missing potentially harmful mergers that went unnoticed (type II errors).</li> </ul>

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For further details on notification thresholds, see *infra* section 3.3.

In light of the pros and cons of each notification system, and given Chile's current experience and its economic and institutional landscape, a mandatory system may prove more effective, provided the conditions ensuring its effectiveness can be met.<sup>189</sup> Both the TDLC and the FNE have also expressed the view that merger control in Chile should be mandatory and pre-merger.<sup>190</sup>

Under a mandatory notification system, only mergers that meet the notification thresholds are subject to merger control. Below the thresholds, mergers escape merger control and can be consummated without prior approval. Most merger control regimes around the world have adopted this pure mandatory notification system, mostly as a matter of realism and effectiveness, since not all mergers can be reviewed and because the thresholds aim to hopefully capture most of the potentially anti-competitive mergers.

An alternative to this pure mandatory system is to set up a **hybrid** notification system, which essentially consists in a mandatory notification system above certain thresholds, while opening the door to occasional merger control below the thresholds by: (i) allowing the Parties to voluntarily notify their merger where they seek certainty over their transaction, and (ii) granting the enforcer *ex officio* powers to review and to act against mergers that may raise competition concerns despite falling below the thresholds. In fact, a handful of countries have introduced, or are considering to introduce, the possibility for the enforcer to exceptionally require merger notification even when the notification thresholds are not met.<sup>191</sup> The hybrid notification system

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<sup>189</sup> Especially clear and objective notification thresholds set at a level that does not unduly burden or paralyse the merger control system.

<sup>190</sup> TDLC 2013 Annual Report, op. cit., p. 13: “*Por ello estimamos preferible que, de establecerse un sistema de control preventivo, [...] Una prenotificación obligatoria a la FNE de operaciones que excedan cierto umbral*”. The FNE confirmed this view e.g. through its Merger Guidelines and merger review practice.

<sup>191</sup> For example, in Canada, voluntary notification is admissible below the thresholds to seek advance clearance from the Commissioner for competition (i.e. the confirmation that he will not challenge de merger); the Commissioner also enjoys *ex officio* powers below the thresholds. In South Africa, only medium and large mergers are subject to mandatory notification but small mergers (as defined by law) can occasionally be “called upon” for notification. Estonia is also considering to allow its competition authority to require notification of a merger that does not exceed the turnover-based notification thresholds, provided the acquiring party was found in a previous decision to hold a dominant position, see

may seem attractive, as it combines the benefits of both mandatory and voluntary notification systems, but its relevance and effectiveness depend on a combination of factors:

- The overall relevance and need for a hybrid system depends on the scope of jurisdiction (merger definition) and the level of the notification thresholds. If mergers are defined broadly and thresholds are set high, a hybrid system may be useful to capture some of the potentially numerous and diverse transactions falling below the thresholds. On the contrary, where mergers are narrowly defined and/or thresholds are set low, a hybrid system may be of little use.
- A hybrid system may also prove particularly relevant in a jurisdiction where notification thresholds are set for the first time. It enables the enforcer to examine certain mergers below the thresholds but that should have been caught, until further revision of the thresholds.
- A hybrid system requires that both sets of conditions be satisfied: the conditions for a mandatory system above the thresholds, plus the conditions for an effective voluntary system below the thresholds. The feasibility and effectiveness of such a hybrid system therefore depends on the ability of the jurisdiction to sustain this demanding range of preliminary requirements.
- It may also require additional resources. Whether the Parties will actually notify below the thresholds depends primarily on the likelihood of detection and actual *ex officio* enforcement below such thresholds. Policy makers should weigh these additional costs against the benefit of an incremental or exceptional review below the thresholds.
- The hybrid system should not bring back the flaws of Chile's current merger control regime, especially legal uncertainty. Clear rules and consistent enforcement are particularly important in a hybrid system for companies to self-assess whether their merger even below the thresholds may raise competition concerns.<sup>192</sup>

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OECD, Report on Implementation of the 2005 Recommendation: Country Experiences with the 2005 OECD Recommendation on Merger Review (2013), <http://www.oecd.org/daf/competition/ReportonExperienceswithMergerReviewRecommendation.pdf>.

<sup>192</sup> This is also a key condition in pure voluntary notification systems. The difference resides in that in a voluntary system, all resources are spent on

Last but not least, setting up a notification mechanism must go hand in hand with the improvement of the merger review process as a matter of priority.<sup>193</sup> Absent the adoption of a streamlined process and reasonable review periods, none of the notification mechanism may work.<sup>194</sup>

**Notification features.** For the notification system to be effective and predictable, the following features must be satisfied irrespective of whether notification is mandatory, voluntary or hybrid:<sup>195</sup>

- A merger notification should only be required if it bears an “appropriate nexus with the jurisdiction concerned”.<sup>196</sup> A transaction has a sufficient local nexus where it is “likely to have a significant, direct and immediate economic effect within the jurisdiction concerned”.<sup>197</sup> That does not mean that a substantive assessment must be conducted pre-notification but that at least some relevant geographic link must be established between the transaction or the Parties and the country of notification.<sup>198</sup> To establish an appropriate

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such filings, whereas under a hybrid system, resources are to be shared between mandatory and voluntary filings.

<sup>193</sup> For further explanation on review powers and procedures, see *infra* under section 4.

<sup>194</sup> Under an inefficient or unreliable voluntary system, most companies would avoid notifying their merger, preferring to close their merger without clearance (including anti-competitive ones) or to abandon their merger plan (including pro-competitive ones), rather than to go through a burdensome or excessive review process. Under a mandatory (or hybrid) system, an inefficient review process may force numerous transactions, including pro-competitive ones, to stand still for too long, and hereby annihilate the whole purpose of promoting economic efficiency and consumer welfare through merger control.

<sup>195</sup> These general features apply in addition to the conditions specific to each notification system listed in the prior table.

<sup>196</sup> ICN Recommended Practices, op. cit., article I.A.

<sup>197</sup> *Ibid.*

<sup>198</sup> OECD Merger Recommendation, article I.A.1.2.(i).

local nexus, most jurisdictions require that two of the merging parties, or at least the acquired business, have domestic activities.<sup>199</sup>

- The law must determine who can notify a merger. Under Chile's current law, third parties may submit a merger for review, either upon an adversarial action or potentially through consultation.<sup>200</sup> In most jurisdictions, merger notification can only be filed by the Parties. In case of failure to notify, whether voluntarily or obligatorily, on the part of the Parties, only the enforcer, which represents and acts in the public interest, should be admitted to launch of merger review (although it may be prompted by a third party complaint).<sup>201</sup>
- The law ought to determine the *ex officio* powers of the enforcer. Under a mandatory or hybrid system, can the enforcer open on its own motion a merger review below the notification thresholds against a likely problematic merger and above the thresholds against an un-notified merger? Under a voluntary system, in what circumstances can the enforcer review mergers that may raise competition concerns? If so, the law should specify the scope of such powers and the circumstances under which mergers may in fact raise concerns and trigger *ex officio* merger reviews.<sup>202</sup>
- Timing of notification is important if merger control is meant to be preventive and effective. In particular, the law should indicate the moment from when a notification is due (e.g. a good faith intention to consummate the planned transaction),<sup>203</sup> while providing the Parties

<sup>199</sup> Local nexus requirements are discussed further *infra* under section 3.3 on notification thresholds.

<sup>200</sup> Third party standing to initiate a consultation is not wholly settled at TDLC level. See *supra* on the controversy around the LAN/TAM merger.

<sup>201</sup> Generally, third parties' role in a merger context is limited to the right to submit relevant information and comments in the context of an already notified merger or to report an un-notified merger that exceeds the thresholds, which may trigger the enforcer's *ex officio* action.

<sup>202</sup> Such *ex officio* powers may substantially influence whether the parties will seriously consider notifying their merger in a voluntary or hybrid system. In a mandatory system, *ex officio* powers below the thresholds may be seen as unfair if the parties are not granted the opportunity to voluntarily notify below the thresholds as well.

<sup>203</sup> ICN Recommended Practices, article III.A.



with some degree of flexibility in determining the exact moment when they have to notify the planned transaction.<sup>204</sup> In a suspensory merger regime, the Parties may be incentivised to notify promptly but no deadline should be imposed for pre-merger notification.<sup>205</sup>

- Information requirements should be reasonable and consistent with effective merger review.<sup>206</sup> The information required should enable the enforcer to assess the competition effects of the notified merger. At the same time, information requirements should “*avoid imposing unnecessary costs and burdens on merging parties and third parties*”.<sup>207</sup> The set of information to accompany the notification should be clearly set either in the law or in a notification form model. Completeness is important since it commonly starts the clock for merger review periods. Before notification, many OECD countries have introduced the possibility of pre-notification exchanges between the Parties and the enforcer, during which the need to notify and the extent of the information required may be discussed.<sup>208</sup> Post-notification, the enforcer may still issue requests for information to the Parties or third parties as part of the review process to conduct its merger analysis.
- Merger notifications should be filed only with the competition authority in charge. Where two entities have powers under competition law (like the FNE and the TDLC in Chile) merger control rules must make it clear to which agency merger notification should be made.<sup>209</sup>

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<sup>204</sup> OECD Merger Recommendation, article A.1.2.(v). Timing is also of the essence to identify when a sanction for failure to notify or for closing before clearance (“gun jumping”) may apply.

<sup>205</sup> ICN Recommended Practices, article III.B.

<sup>206</sup> OECD Merger Recommendation, article I.A.1.2.(iii).

<sup>207</sup> *Ibid.*, article I.A.1.2.

<sup>208</sup> Such pre-notification efforts should not be used however to unduly burden or to extent the review process before the formal review periods start. Pre-notification contacts may notably be useful where the Parties are unsure whether they ought to notify their merger plan at all (e.g. foreign companies) and whether they may qualify for a short form notification, hence an expedited procedure.

<sup>209</sup> See *infra* under section 4 on merger review procedures and powers.

**Summary: Notification system**

- Merger control requires that a clear notification system be set up for mergers to be brought to the enforcer’s attention. The merger notification system must be effective, efficient and timely.
- Chile should firstly make a clear policy choice as to whether merger notification will be triggered by a mandatory, a voluntary or a hybrid notification system:
  - Chile’s current voluntary notification system does not seem to work effectively.
  - Given the conditions, pros and cons of voluntary and mandatory systems and given Chile’s economic and institutional landscape, a mandatory system may prove more effective.
  - The hybrid notification system may also prove effective and it may catch more mergers than in a mandatory system, but its relevance and effectiveness depend on additional factors.
- Once it has chosen its optimal type of notification system, Chile should secondly establish essential general features for its merger notification system to be effective and predictable:
  - Require merger notification only if it has an appropriate nexus with Chile, such as the merging parties’ or target’s local activities.
  - Identify who should notify a merger. Under an effective notification system, merger notification is the duty of the merging parties.
  - Determine what *ex officio* powers are vested in the enforcer. Such powers may substantially influence whether the parties will seriously consider voluntary notification.
  - Indicate at what point in time a merger plan should be notified.
  - Information requirements should enable to conduct a merger analysis, but they should also “*avoid imposing unnecessary costs and burdens on merging parties and third parties*”. The possibility of issuing a notification form model may also be envisaged.
  - Clearly designate the competition authority responsible for receiving merger notifications.

### 3.3 *Notification thresholds*

#### 3.3.1 *Issues*

Chile's current merger control regime does not contain notification thresholds. This absence goes together with the fact that Chile's law does not provide for any merger-specific notification mechanism.

As already mentioned, the only benchmark for so-called voluntary merger notification is found in article 3 of the Competition Act. This provision is the only legal criterion under which the Parties may conduct a self-assessment of their transaction and decide whether to lodge a consultation with the TDLC.<sup>210</sup> Article 3 is a substantive test and does not offer any guidance to the Parties as to whether their merger should be notified and/or whether it may face the enforcer's or third party action under Chile's current regime.

The FNE Merger Guidelines provide for HHI-based thresholds. HHIs are calculated according to market concentration levels, hence market shares.<sup>211</sup> The FNE indicates that it is unlikely to examine or to act against transactions that fall below such thresholds. The HHI-based thresholds therefore act as a substantive safe harbour (or *de minimis* rule) with jurisdictional effects, since it is highly unlikely that a merger would be notified or attract scrutiny below such thresholds. In practice, these FNE thresholds have had very limited or no impact on Chile's current merger control system: (i) HHI thresholds are not clear and objective criteria for notification, since they are subject to the substantive assessment of the relevant market; (ii) they have no legal or binding effect, (iii) they may only be relevant to the FNE's own practice and (iv) they only apply to horizontal mergers.<sup>212</sup>

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<sup>210</sup> No specific nexus or level of activity in Chile is required for foreign transactions, save for the existence of a potential effect in Chile under the general provision of Article 3. The enforcers and Parties are therefore left with the uneasy substantive assessment of foreign mergers, bearing the risk of over-catching or under-catching merger control enforcement.

<sup>211</sup> FNE Merger Guidelines, Section I.2.4, see Part I of this Report for further details.

<sup>212</sup> See Part I for further details on the FNE Merger Guidelines.

### 3.3.2 *Assessment and Recommendations*

Notification thresholds are an essential factor in selecting the mergers that will actually be subject to merger control. The main purpose of notification thresholds is to establish a sufficient nexus with the jurisdiction and to filter transactions that are potentially more likely to raise competition concerns.

That does not mean that all notified mergers raise concerns, but that, above the thresholds, they belong to a category of transactions that is presumed to potentially have an impact on competition and therefore require actual scrutiny. The purpose of notification thresholds is thus to trigger notification.<sup>213</sup>

Notification thresholds are essentially relevant under a mandatory or a hybrid system, where clear and objective criteria are required to establish whether a merger must be notified.

Conversely, under a voluntary notification regime, there is no need for establishing notification thresholds. The main trigger of voluntary notifications commonly consists in the criteria for the substantive assessment of a transaction, which should be sufficiently clear and objective for the Parties to self-assess whether they ought to notify their merger plan and for the enforcer to potentially act *ex officio* to review such mergers.<sup>214</sup>

Accordingly, should Chile choose a mandatory or a hybrid notification system, serious consideration must be dedicated to determining appropriate notification thresholds. In doing so, the following principles and caveats are relevant.

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<sup>213</sup> *Notification thresholds* are to be distinguished from *substantive thresholds*: substantive thresholds are examined at a later stage and aim to determine whether a notified merger actually gives rise to competition concerns, i.e. the ultimate goal of merger control (see *infra* section 5 on the substantive analysis). The purpose of substantive thresholds is thus to conclude on the competitive effects of the transaction; they come into play only after the notification thresholds have pre-selected mergers subject to actual review.

<sup>214</sup> Although a voluntary system seems to save a step in the process, namely the notification threshold filter, it relies heavily on the Parties' self-assessment and on the conduct of a substantive analysis even before the merger is notified. This analysis may involve more time and resources than a straight-forward filtering through objective notification thresholds, and it may miss the opportunity to revise potentially problematic mergers. That is why most jurisdictions around the world rely on notification thresholds to compel the notification of exceeding mergers.

- Notification thresholds should be clear and objective, based exclusively on objectively quantifiable criteria.<sup>215</sup> They should establish a sufficient nexus with Chile according to understandable, bright-line and easily administrable criteria.<sup>216</sup> Market share-based tests and other subjective thresholds are generally not considered as meeting this standard, since market shares depend on the definition of relevant antitrust markets.<sup>217</sup> That is why many OECD countries have moved from subjective (e.g. market share) to objective (e.g. turnover) criteria for notification purposes.<sup>218</sup> Objective criteria must be clearly established by law as to their *object and nature*:
  - *What*: Objective and quantifiable criteria typically consist in corporate **turnover** or asset data (company size) and/or in the value of the contemplated merger (transaction size). Turnover-based criteria constitute the most common notification threshold. This information is generally readily available in most companies' accountancy.<sup>219</sup>
  - *Where*: To ensure an appropriate local nexus with the jurisdiction, the **domestic** turnover or domestic assets are most relevant. In fact, a worldwide turnover may reveal that the company concerned is large at multinational level, but that may not be sufficient to establish a relevant presence in the jurisdiction.<sup>220</sup> Domestic

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<sup>215</sup> OECD Merger Recommendation, article I.A.1.2.2., and ICN Recommended Practices, article II.A and B.

<sup>216</sup> ICN Recommended Practices, article II.A and B.

<sup>217</sup> Ibid, article II.A: “*Examples of criteria that are not objectively quantifiable are market share and potential transaction-related effects*”.

<sup>218</sup> OECD 2012 Merger Recommendation Review, section 3.1., pt 17.

<sup>219</sup> An additional threshold based on the size of the transaction can be considered to further limit merger control to transactions that exceed a certain value. A high turnover criterion combined with no or low transaction value criteria, allows to catch any merger contemplated by large companies. Conversely, a low turnover criterion combined with a high transaction value criterion allows catching large transactions whether contemplated by small or large companies. There is a risk however of seeing the Parties game around the transaction size threshold in the elaboration of their merger plan, to avoid filing.

<sup>220</sup> That does not mean that worldwide turnover should be excluded as a relevant criterion but it should then be added to the domestic turnover-based criterion.

turnover-based thresholds require rules for the geographic allocation of turnover.<sup>221</sup>

- *Who*: Since a merger involves at least two independent companies (i.e. companies that belong to distinct independent corporate groups), notification thresholds should specify whose turnover is relevant for the thresholds to be met. To ensure that merger control concentrates on mergers with a local nexus and with a likely impact on domestic markets, many jurisdictions require that the domestic turnover thresholds be met at least by the **acquired company** (“target”), if not by both Parties.<sup>222</sup> In case of partial acquisitions, only revenues generated by the acquired business or assets should be taken into account.<sup>223</sup>

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In such a case, only companies with relevant domestic sales that are also large at international level will be subject to the merger notification requirement. This restrictive approach may not be useful to Chile, where most large companies have significant activities in Chile but not at international level.

<sup>221</sup> For example, allocating turnover to the location of the customers (i.e. where the goods are delivered or the services provided) or to the point of sale. The European Commission’s jurisdictional notice provides rules for the calculation and geographic allocation of turnover for merger control purposes: Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:095:0001:0048:EN:PDF> (also available in Spanish at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:095:0001:0048:ES:PDF>), pp. 37-45. Geographic allocation rules are critical notably to avoid unnecessary notifications by large *export* companies, whose goods or services are not sold in Chile and whose merger may bear trivial or no impact in Chile. This may be relevant to mergers contemplated e.g. by copper companies: Chile’s copper sector represents over half of its total exports and has accounted for about 14% of Chile’s GDP in recent years; see OECD, Economic Survey of Chile, 2013, p. 15 available at: [http://www.keepeek.com/Digital-Asset-Management/oecd/economics/oecd-economic-surveys-chile-2013\\_eco\\_surveys-chl-2013-en#page17](http://www.keepeek.com/Digital-Asset-Management/oecd/economics/oecd-economic-surveys-chile-2013_eco_surveys-chl-2013-en#page17).

<sup>222</sup> ICN Recommended Practices, article I.C.

<sup>223</sup> Clear guidance should also be provided as to how turnover data ought to be calculated (net/gross, group/subsidiy, relevant financial year, etc.).

- *When*: Threshold rules may also consider setting a **timeframe** within which successive small transactions between the same parties may be looked at as a whole to determine whether the notification thresholds are met by the sum of the transactions. This is particularly relevant where thresholds are based on the target’s size or on the transaction size, in order to counter any segmenting strategy by companies aimed at escaping merger control (so-called “staggered acquisitions”).
- In light of the above considerations, Chile could establish notification thresholds along the criteria summarised in the Box below.

**Box 4. Notification threshold criteria**

**Main criterion:** The domestic turnover (or assets) of each of two of the merging parties (including the target), or at least of the target.

**Additional criterion:** To restrict notifiability further, an additional prong may be added to the main criterion, such as the combined domestic turnover of the merging parties together, their worldwide turnover or assets, and/or the value of the transaction.<sup>224</sup>

- Once the criteria are clear as to their object and nature, their *numerical level* should be determined for the Parties to know above which numbers their merger plan must be notified. In other words, above what turnover level(s) or transaction value should the Parties notify their merger? To that end, the following observations are relevant:
  - There is no unique rule or general principle for the determination of numerical threshold levels. Every jurisdiction determines the appropriate thresholds on the basis of various factors: its GDP, the standard size of companies operating within its territory, and the average number of transactions that can be effectively reviewed.<sup>225</sup> Chile lacks comprehensive statistical data on the total or average

<sup>224</sup> The more criteria, the lower the number of notifications.

<sup>225</sup> Marco Botta, *Merger control regimes in emerging economies: a case study on Brazil and Argentina*, Kluwer, 2011, p. 149.

number of mergers closed every year, as well as on the average size of companies operating in Chile. To determine its notification thresholds, it may therefore (i) inquire about the size of most companies in Chile, and (ii) look at the thresholds of countries with similar GDP levels and effective merger control mechanisms.<sup>226</sup>

- The question is often raised as to whether separate thresholds should apply to separate industries. For example, should higher thresholds apply to the copper industry in Chile, where companies and transactions are sizeable? Separate thresholds by sector are a risky option because they raise similar uncertainties as market share-based thresholds, namely how to define the scope of an industry or sector for purposes of setting a distinct threshold? How to apply industry-specific thresholds where a merger involves various sectors (e.g. among large corporate groups or in vertical and conglomerate transactions)? In addition, how to avoid claims that thresholds are discriminatory, arbitrary or political, if they seem to favour or focus on certain industries? How to adapt these thresholds as fast as industries change? The risks, costs and uncertainties of distinct thresholds explain why the same notification thresholds may and should apply across all industries. There are in fact two other means to avoid the notification or the review of unproblematic mergers in these cases:
  - i. First, certain mergers even contemplated by large companies may not trigger notification: as mentioned above, rules for the geographic allocation of turnover generally allocate revenue to the country where competition takes place (e.g. the customers' location or point of sale). Accordingly, mergers contemplated by major companies that mainly export won't be subject to notification even under thresholds of general application to all industries.

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Countries with similar GDP levels and mandatory notification mechanisms include e.g. Ireland, Finland and Greece. For a description of their merger control regime, including details over their notification thresholds, by country, see *Getting The Deal Through, Merger Control 2014*, <http://gettingthedealthrough.com/books/20/merger-control/>. For GDP statistics, see OECD.StatExtracts, [http://stats.oecd.org/Index.aspx?DatasetCode=SNA\\_TABLE1](http://stats.oecd.org/Index.aspx?DatasetCode=SNA_TABLE1) and The Economist, *Pocket World in Figures*, 2013 Edition, p. 24.



- ii. Second, certain mergers may be notified but not necessitate a full review process: as explained *infra*,<sup>227</sup> substantive rules may establish that within certain limits, i.e. a safe harbour, a merger is presumed not to raise competition concerns and therefore benefit from an expedited review procedure. This ensures non-discrimination as to which transactions are notifiable while granting a fast-track review for unproblematic notifiable mergers.
- The determination of the level of thresholds has raised great concern and worry in Chile. Since no jurisdiction can predict with full certainty whether the threshold level is set at an optimal level from the first time. This is especially relevant where notification thresholds are set for the time with no comprehensive statistics to measure their impact on the number of filings and on the relevance of the transactions filed. To ensure flexibility over time, most jurisdictions foresee the possibility for periodic evaluation and revision of the thresholds and for an enhanced statistic-gathering process. OECD standards recommend indeed the periodic review of their merger laws and practices to seek improvement and convergence towards best practices.<sup>228</sup>

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<sup>227</sup> See *infra* section 4 for further explanation on a possible expedited review and section 5 on the substantive thresholds (safe harbour).

<sup>228</sup> Any reform of Chile's merger control regime should thus clarify what can only be set and amended by Congress (e.g. their object and nature – turnover, asset, or transaction value; domestic, or worldwide; target or combined; etc.) versus what can be granted to delegated powers (e.g. the level of the threshold) to ensure practical flexibility and the efficient (re-)allocation of merger control resources. This body with delegated powers should be independent and entitled to collect all relevant statistics and information to conduct its task. If Congress cannot ensure such a periodic review, it should set the framework and conditions for such revisions by another body (e.g. the Central bank of Chile or an *ad hoc* expert commission).

**Summary: Notification thresholds**

- Notification thresholds determine which mergers will actually be subject to notification and actual merger control. They must establish a sufficient nexus with the jurisdiction and filter transactions that are potentially more likely to raise competition concerns.
- Notification thresholds are particularly relevant under a mandatory or a hybrid system. Under these systems, consideration should be given to determining clear and objective thresholds as to their nature and object, and their numerical level.
- The determination of the *nature or object* of notification thresholds must be guided by:
  - Objective and quantifiable criteria: e.g. the turnover or asset value (company size) and/or the value of the contemplated merger (transaction size).
  - An appropriate local nexus with the jurisdiction: the turnover or assets should be domestic, i.e. generated in Chile.
  - Focusing merger control on mergers that may have an effect on the domestic markets: the threshold should be met by at least the acquired company.
  - A timeframe within which notification thresholds may be met by the sum of successive small transactions between the same companies (so-called staggered acquisitions).
- The determination of the *numerical level* of the thresholds should consider the following:
  - Chile may determine the appropriate numerical level in light of e.g. its GDP, the standard size of companies operating on its territory, and the number of transactions that can be effectively reviewed.
  - Separate thresholds by sector are a risky option because they raise similar uncertainties as market share thresholds; they risk facing claims of being discriminatory, arbitrary or political; and they may not be adaptable as fast as industries evolve.
  - The need for legal certainty should be balanced with the possibility of adjusting the thresholds, if experience shows that they were set too high or too low.

## 4. Review powers and procedures

### 4.1 Issues

Absent a clear and effective merger control regime established by law, the FNE and the TDLC resort to the general procedures and powers laid down in the Competition Act in order to review certain mergers and preserve competition. The use of these procedures and powers in a merger context however raises concerns of legality, transparency, effectiveness and efficiency. These fundamental issues essentially arise from the following concerns:

*No streamlined review procedure.* The main concern in Chile's current system relates to the absence of a streamlined and predictable procedure for merger control:

- Merger control faces a multiplicity of possible procedures. Currently, a merger may be subject to a consultation filing to the TDLC, an adversarial action before the TDLC, or a submission for review with the FNE. In addition to the multiplicity of available procedures, the same merger may in fact be subject to several of them, simultaneously or successively.<sup>229</sup>
- There is no distinct or expedited procedure to review unproblematic mergers. All mergers are potentially subject to the same general procedures whether they are likely to raise competition concerns and regardless of whether it would require extensive review or not.
- Certain procedures have questionable legal bases, as they result from a combination of general formal TDLC procedures (set by law) and informal FNE Guidelines. Stakeholders may thus have to deal with binding rules that are not merger specific and that prove often inflexible and ill-suited in a merger context, and with merger-specific

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An FNE merger review lodged under its Merger Guidelines does not prevent the simultaneous or subsequent submission of the merger to the TDLC review. At TDLC level, there is even a risk for both consultation and adversarial procedures being lodged. How these two procedures should be articulated is addressed by the TDLC Decree on Parallel Procedures, op. cit., giving precedence to consultation unless an adversarial procedure is lodged post-merger, in which case the adversarial procedure takes precedence. See Part I of this Report for further details on the articulation of the TDLC procedures under this Decree.

guidelines that are not binding and cannot offer the necessary legal certainty.

- The availability of voluntary *ex post* procedures for merger control purposes may have counter-productive effects. The suspensory effect of (long) *ex ante* consultations and the availability of this *ex post* procedure provide incentives for the Parties to consummate their merger first and to consult afterwards, no matter the risk of retroactive remedies: “Better be sorry than ask for permission.” This adverse effect runs counter the preventive goal of merger control and exacerbates the intricacies and uncertainties inherent to the system and to any closed merger that could be subject to late remedies.

***No streamlined remedy procedure.*** Remedies imposed in the context of Chile’s merger control also face a multiplicity of procedures: they can be imposed by virtue of an extra-judicial settlement between the FNE and the Parties subject to the TDLC approval, by judicial conciliation between the FNE and the Parties before the TDLC in an adversarial proceeding, or by unilateral TDLC resolution or ruling following a consultation or an adversarial procedure. As a result:

- Although merger settlements with the FNE currently provide a pragmatic solution for the Parties willing to agree on remedies, their acceptance by the TDLC is uncertain,<sup>230</sup> plus they do not prevent a separate procedure before the TDLC.<sup>231</sup>
- Merger investigations are sometimes closed by the FNE subject to conditions agreed to by the Parties in order to avoid further investigation or a submission of their merger by the FNE to the TDLC. These conditions are published in the FNE’s closing reports.<sup>232</sup> They do not amount to formal settlements, nor do they prevent subsequent action before the TDLC.

<sup>230</sup> The Nestlé/Pfizer settlement was approved by a tight majority of TDLC judges: TDLC, *Nestlé/Pfizer*, op. cit. See footnote 87 *supra* for further details on the controversy around this matter.

<sup>231</sup> This happened for example in the LAN/TAM case, op. cit.

<sup>232</sup> See FNE, *Cencosud/Johnson*, File N° 1978-11, 22 December 2011; and FNE, *Laboratorios Andormaco/Grünenthal*, File F-20-2013, 11 April 2014.

- The consultation procedure is the most common and used merger review procedure in Chile, but it is the only procedure that does not allow for conciliation, negotiation or settlement on remedies. Also there is no remedy procedure for the Parties to propose remedies and hereby to constructively anticipate on the outcome of the merger review.<sup>233</sup> Remedies can only be imposed unilaterally by the TDLC following a consultation procedure even when it was voluntarily launched by the Parties. This pitfall has deterred certain companies from consulting the TDLC and it has encouraged the ones subject to a TDLC decision to lodge an appeal before the Supreme Court, most generally against remedies.
- The adversarial procedure also allows for remedies, which entail the difficulty of (i) crafting well-suited remedies in a litigation setting, and (ii) crafting remedies *ex post* and retroactively, with likely adverse consequences for business partners and consumers in the relevant markets.

**No review periods.** The time frame within which mergers are reviewed in Chile is neither determinable, nor reasonable.<sup>234</sup>

- As shown in the **Annex** to this Report, a merger review procedure before the TDLC lasts on average 263 calendar days (approx. 9 months), ranging from 98 days to 520 days.<sup>235</sup> The Competition Act does set a few procedural time limits, but they tend not to be respected by the TDLC in practice.<sup>236</sup> In addition, half of the mergers subject to TDLC decisions are subsequently reviewed in appeal procedures by the Supreme Court, which takes an additional 189 days, i.e. more than

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<sup>233</sup> Article 31 (2) and (3), of the Competition Act provides for the possibility of an accelerated consultation procedure before the TDLC provided the Parties agree to the remedies proposed by the FNE.

<sup>234</sup> The Expert Commission Report on a possible reform of Chile’s competition law, op. cit., similarly observed that a “*consultation proceeding takes up to one year, which ‘seems excessive’*”.

<sup>235</sup> Taking into account consultation and adversarial merger review procedures.

<sup>236</sup> Articles 20 to 26 (adversarial) and articles 31 and 32 (consultation) of the Competition Act lay down specific time frames for the various procedural steps of a TDLC procedure. These time limits are not merger-specific.

6 months, on average.<sup>237</sup> Accordingly, the Parties that consult the TDLC or that are subject to a consultation lodged by the FNE or third parties, never know how long the review process will last for, irrespective of whether their merger raises serious competition concerns or not. The absence of merger review periods and the actual length of the merger review process have represented the strongest disincentive for Parties against notifying their merger in Chile.<sup>238</sup>

- Before the FNE, the Parties may benefit from a 60-day review process under the FNE Merger Guidelines. However, this FNE procedure is set by non-binding guidelines, it is not suspensory, it does not prevent simultaneous or subsequent TDLC review procedures, and closing of the review by the FNE does not amount to a formal approval. In other words, the Parties that voluntarily notify their merger to the FNE face the risk of coping with two to three review procedures: before the FNE, the TDLC and the Supreme Court.<sup>239</sup>

***No collaborative process.*** The Parties' participation in the merger review process at TDLC level is limited to their written submission, followed by a single oral hearing with all interested parties.<sup>240</sup> There is no room for discussion between the parties and the TDLC: no pre-notification process, no opportunity to consult the TDLC at key stages of the review process, no state-of-play meetings, no timely communication by the TDLC of its concerns to the parties before its final decision, no specific hearing or discussion on remedies when contemplated. The TDLC is and acts as a judicial body with adjudicative powers, including in the merger context. The absence of collaborative process with the Parties and the unilateral solution imposed by virtue of TDLC

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<sup>237</sup> Despite no explicit rule as to whether the Supreme Court's judicial review imposes a standstill on the merger, the Parties would generally not consummate their transaction pending the Supreme Court's ruling.

<sup>238</sup> Certain companies acknowledge avoiding to consult (and hoping for no FNE or third party action) or abandoning their merger project, because they cannot afford the cost and uncertainty of a lengthy review procedure.

<sup>239</sup> This happened e.g. in the LAN/TAM case where settlement negotiations with the FNE following the parties' voluntary notification, did not prevent a third party action before the TDLC. This third party action triggered a procedure of 8 months with the TDLC, followed by another 6 months with the Supreme Court upon appeal.

<sup>240</sup> Article 31 of the Competition Act.

resolution or ruling explains to some extent why half of the TDLC merger decisions were contested on appeal before the Supreme Court. By contrast, the FNE Merger Guidelines design a review process before the FNE that involves the Parties into a collaborative process.

***Excessive third party power.*** Mergers can be exposed to third parties' opportunistic action in Chile, since article 18 (2) of the Competition Act has been construed by the TDLC as allowing third parties with a legitimate interest to lodge a consultation procedure before the TDLC.<sup>241</sup> However, a private legitimate interest is not the general interest, nor is it aimed at the preservation of competition.<sup>242</sup> In addition, it grants third parties the power to suspend a merger project at their sole discretion, since a consultation *ex ante* is suspensory no matter who lodges the procedure. Third parties admitted to the TDLC procedure are also granted the right to challenge a TDLC decision (resolution or ruling) before the Supreme Court, which can further delay the review process upon their own will.

***Opaque investigation process.*** Before the FNE, transparency and third parties' right to be heard are limited. The opening of an investigation by the FNE is published (allowing third parties to comment on this summary publication). The FNE may also request information from the Parties or third parties in the course of its investigation. However, when the FNE concludes that competition concerns arise and envisages settling with the Parties, third parties are not consistently informed of, or invited to comment on, such issues and possible remedies. There is no publication by the FNE of its preliminary views or remedies contemplated. As a result, third parties' only resort when concerned about a merger that concludes with a settlement, is to by-pass and block the FNE process by lodging an action with the TDLC, provided third parties can afford the cost of a consultation procedure.<sup>243</sup>

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<sup>241</sup> Depending upon the composition of the TDLC however, standing under article 18 (2) of the Competition Act may be construed more restrictively. Third parties can also contest mergers *ex post* through an adversarial procedure under article 18 (1). To date, the only adversarial procedure lodged against a merger was initiated by the FNE (Hoyts cinema).

<sup>242</sup> The risk of opportunistic actions by third parties in the context of merger review was also underlined in the Expert Commission Report on a possible reform of Chile's competition law, *op. cit.*

<sup>243</sup> In the LAN/TAM matter, the consumer association Conadecus initiated a consultation procedure before the TDLC right before the FNE submitted its

**Lack of investigative tools.** Both the FNE and the TDLC lack means to compel the provision of timely, accurate and complete information from the merging or third parties. This weakness may jeopardise the effectiveness and accuracy of the merger review process in Chile.

#### 4.2 *Assessment and Recommendations*

Merger control procedures should ensure that mergers are reviewed in an efficient, effective, predictable and timely manner at all stages of the review process.<sup>244</sup> Procedural rules applicable to merger review must be transparent and publicly available. Chile could consider the following procedural principles to improve its merger review powers and procedures:

**Two-stage procedure.** Not all notifiable mergers deserve extensive scrutiny. Most mergers do not raise competition concerns, or may raise concerns that can be easily addressed through remedies. An expedited review and clearance procedure should be available to deal with unproblematic mergers.<sup>245</sup> On the contrary, extensive scrutiny may be needed for complex mergers, for mergers that raise serious competition concerns and/or where the complexity of remedies requires further examination. That is why most jurisdictions provide for a two-stage merger control procedure: a first initial phase (“Phase I”), which allows for the prompt review and approval of clear and unproblematic mergers with or without remedies; and a second extended phase (“Phase II”), which allows for the full scrutiny of complex or problematic mergers and may lead to remedies or even to the prohibition of the merger where competition concerns cannot be solved.

Under Chile’s current system, the absence of a merger-specific review process and the coexistence of various procedures applicable to mergers have led

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settlement for approval. This third party association was not informed of the merger issues or remedies under discussion between the FNE and the Parties. Had the association’s concerns been heard at the FNE level, it is unclear whether it would still have considered a TDLC action.

<sup>244</sup> OECD Merger Recommendation, articles I.A.1 and I.A.2. and ICN Recommended Practices, article VI.A.

<sup>245</sup> OECD Merger Recommendation, article I.A.1.2.iv. An expedited procedure may apply notably where merger control law or guidelines indicate that, below certain substantive thresholds (i.e. *de minimis* safe harbours), usually market share thresholds, a merger is presumed not to raise any concern. For further details, see *infra* under section 5 on the substantive analysis.



to inefficiency and uncertainty. A reform of the system should lay down by law an effective and predictable merger review procedure. If both the FNE and the TDLC are to retain competence in the merger control field and considering that merger review takes place *ex ante* as recommended under a pre-merger notification system, the review procedure may consist in one of the following options:

- **Option 1 – Phase I before the FNE and Phase II before the TDLC:**
  - *FNE – Phase I.* Merger notification should be filed with the FNE, which would have exclusive jurisdiction to conduct the Phase I review of mergers. Within a specified period,<sup>246</sup> the FNE should conclude: (i) whether the merger can proceed without objections,<sup>247</sup> or (ii) whether it requires an in-depth review, in which case the FNE should submit the merger to the TDLC for a Phase II in-depth investigation.<sup>248</sup> The FNE could also be entitled to impose remedies in Phase I under certain conditions.<sup>249</sup> A merger could not be prohibited by the FNE following a Phase I.

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<sup>246</sup> See *infra* under this section re: merger review periods.

<sup>247</sup> If the FNE fails to adopt a decision within the Phase I time frame, the merger should be deemed approved (i.e. “positive silence” rule). This rule prompts the enforcer to focus on problematic mergers, while letting unproblematic mergers go through with no further delay.

<sup>248</sup> See *infra* under this section re: decision-making powers.

<sup>249</sup> A sensitive question to certain stakeholders is whether the FNE should be granted the power to impose remedies without the TDLC’s intervention. These stakeholders are concerned that decision-making powers would be granted to the executive, whereas they should belong to the judiciary perceived as providing more guarantees of independence and due process. In fact, to be entrusted with merger decision powers, every competition enforcer, whether part of the executive or the judiciary, should satisfy conditions of independence and procedural fairness. Procedural fairness in the context of merger control, commands principles of transparency, timeliness, openness, consistency and non-discrimination towards the Parties and third parties with a legitimate interest. Although both the FNE and the TDLC already offer substantial guarantees of independence and procedural fairness, improvements are possible. At the TDLC level, procedural fairness could be strengthened e.g. by reinforcing incompatibility rules for the TDLC judges (article 6 of the Competition Act), by streamlining the merger review procedure, by offering more transparency throughout the merger review process and by opening up timely and constructively to the Parties. Concerning FNE, the language of the Competition Act (article 33 al. 1) could be clearer and stricter to actually

- *TDLC – Phase II.* In Phase II, the TDLC would have full review powers to conduct an in-depth assessment of the merger (e.g. through market testing and hearing relevant stakeholders and experts). Within a specified or determinable time frame, the TDLC should adopt a final decision, which may consist in: (i) the approval of the merger, (ii) the conditional approval of the merger subject to remedies, or (iii) the prohibition of the merger, when no remedy could alleviate the competition concerns at stake.<sup>250</sup> The Parties should have the right to seek review by a separate appellate body of adverse final decisions on the legality of their merger.<sup>251</sup>

**Option 1** allows for the intervention of the FNE as a first filter in the merger review process and it involves the TDLC for more problematic or complex mergers that require in-depth review. Involving the FNE first, and the TDLC at the second stage of the merger review process, is in line with the changes proposed by the TDLC itself in its 2013 Annual Report.<sup>252</sup> This suggested work allocation between the FNE (Phase I) and the TDLC (Phase II) seems close to the current merger control workload allocation, namely the review of around 20 mergers by the FNE, while the TDLC

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reflect, and to ensure in the long term, the FNE’s independence. The FNE’s practice could also be more transparent and inclusive of third parties, especially where remedies are considered. A reform of Chile’s merger control procedure could therefore further improve procedural fairness with each enforcer, taking into account the special context of merger control, distinct from the traditionally prosecutorial and adjudicatory procedures aimed at antitrust infringements. Power to impose remedies may thus lie with either enforcer, provided the above conditions of independence and procedural fairness are indeed fully guaranteed. On procedural fairness in the merger context, see: OECD Merger Recommendation, article I.A.3; OECD, Policy Roundtables on “Procedural Fairness and Transparency: Key Points” (2010-2012), available at: <http://www.oecd.org/daf/competition/mergers/50235955.pdf>; and ICN Recommended Practices, article VII.

<sup>250</sup> Phase II would be similar to the current consultation procedure, except that it needs be subject to time limits and involve collaboration with the Parties. Absent a TDLC decision within the set time frame, the merger should be deemed approved.

<sup>251</sup> OECD Merger Recommendation, article I.A.3.

<sup>252</sup> TDLC 2013 Annual Report, op. cit., p. 13.

reviews and rules on 1 to 3 mergers, on a yearly basis.<sup>253</sup> On the other hand, under this Option 1, the question arises as to whether the TDLC, as it is currently structured, is well-equipped to effectively handle alone a Phase II, which entails in-depth market investigation, testing and analysis. The TDLC currently relies on the FNE's investigation and findings to a large extent, and it rules on mergers in a unilateral and adjudicative fashion, whereas a Phase II requires strong investigative powers and the ability to act as an administrative jurisdiction. Should the TDLC require the FNE's involvement in Phase II, this double implication may entail redundancies, delays and inefficiencies in the merger review process. In addition, the TDLC used to handle merger as an adjudicative court, whereas merger control requires an open and collaborative process and substantial interaction with the Parties and stakeholders in the affected markets, especially in Phase II.

- **Option 2 – Phase I & Phase II before the FNE and judicial review by the TDLC:**

- *FNE – Phases I and II.* The FNE would have exclusive jurisdiction to review mergers both in Phase I and in Phase II. It could open a Phase II procedure where the merger analysis requires more information and time, and/or where the FNE concludes that the merger raises concerns that could not be remedied in Phase I. Similarly to Option 1, the FNE could authorise the merger to proceed or it could impose remedies in Phase I or Phase II.<sup>254</sup> Under this model, the FNE could also prohibit a merger but only following a Phase II review (i.e. prohibition seen as a last resort to foster the effective assessment of business transactions).
- *TDLC – Judicial review.* Under Option 2, the FNE would have broad review and decision-making powers in merger matters subject to judicial review on appeal. The TDLC has the specialised

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<sup>253</sup> Similarly, in mandatory merger notification systems such as the European Union's, approximately 95% of the reviewed mergers are cleared in Phase I, either unconditionally (97%) or subject to remedies (3%). For complete EU merger statistics, see: <http://ec.europa.eu/competition/mergers/statistics.pdf>.

<sup>254</sup> For further reflection on the possibility of granting such powers to the FNE, see *supra* footnote 249.

skills to be the court for judicial review of the FNE’s merger decisions on appeal.

**Option 2** provides for a streamlined review procedure with one main enforcer, the FNE, who can determine the need for in-depth review and conduct that extended review to establish with more certainty whether the merger preliminarily examined in Phase I gives rise to competition concerns. Option 2 allows for the TDLC’s intervention where a controversy arises.<sup>255</sup> It crystallises the administrative merger decision power with the FNE, while ensuring judicial merger review upon appeal by the TDLC, which is highly specialised and competent in adjudicating controversies under the Competition Act.<sup>256</sup> This option may therefore provide for enhanced effectiveness, timeliness and efficiency in the merger review process.

**Procedural fairness and transparency.** “Procedural fairness should be a basic attribute of all merger review procedures”.<sup>257</sup> Chile’s merger control procedures should ensure that “merger reviews are handled in a fair, efficient, and consistent manner, procedurally and substantively”,<sup>258</sup> which requires the following fundamental conditions:

- **Review periods:** Merger reviews should be completed within a reasonable and determinable time period.<sup>259</sup> The review period should grant sufficient time to the enforcer to conduct its analysis, while at the same time avoiding undue delays since most mergers are time sensitive and not all of them necessitate full scrutiny. The duration of Chile’s current procedures is undeterminable. Excessive and unspecified review periods present a number of risks for the transaction and the Parties’ business, as they threaten the potential efficiencies arising from the merger. Therefore:

<sup>255</sup> In Canada for instance, it is only where the parties disagree with the remedies deemed necessary by the Competition Bureau that the Commissioner of Competition may seize the Competition Tribunal to adjudicate the controversy.

<sup>256</sup> Regarding guarantees of independence and due process, see *supra* footnote 249.

<sup>257</sup> ICN Recommended Practices, article VII.

<sup>258</sup> *Ibid.*

<sup>259</sup> OECD Merger Recommendation, article I.A.1.3 and ICN Recommended Practices, article IV.A.

- The initial merger review (Phase I) should be completed within a specified time limit, whereas the extended merger review (Phase II) should be completed within a determinable time limit.<sup>260</sup> This holds true for suspensory and non-suspensory merger review procedures.<sup>261</sup> Accordingly, legal review periods should be established for each phase, and any extension should be objectively determinable. Following international best practices, the Phase I review should be completed in maximum 6 weeks, and the Phase II review should not take more than 6 months from the initial merger notification (i.e. maximum 4.5 months after the Phase I review).<sup>262</sup>
- Review periods should not preclude the enforcer from adopting early decisions at any stage of the review process, including the possibility for a fast-track clearance.<sup>263</sup>
- The law should set clearly when the “clock starts ticking” (generally when the notification is deemed complete). It should also establish whether requests for information issued by the enforcer in the course of the review process may “stop the clock” (by suspending or interrupting the review period), taking into account that the review as whole must be completed within the specified time frame.<sup>264</sup>
- An *ex ante* merger control system should be suspensory, i.e. notification should suspend the consummation or completion of the merger pending the enforcer’s decision. This suspensory effect is currently set by TDLC decree only; it should be established by law and apply throughout the review process.
- Absent a decision adopted within the legal review period, the merger should benefit from a positive presumption and allowed to proceed (positive silence rule).<sup>265</sup>

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<sup>260</sup> ICN Recommended Practices, article IV.C and D.

<sup>261</sup> Most merger control systems have adopted suspensory procedures.

<sup>262</sup> ICN Recommended Practices, article IV.C and D.

<sup>263</sup> ICN Recommended Practices, article IV.C.

<sup>264</sup> ICN Recommended Practices, article VI.E: information requests should be reasonably tailored and may not unduly delay the review process.

<sup>265</sup> ICN Recommended Practices, section IV.C.

- **Parties’ rights:** The consultation and adversarial procedures of the Competition Act are inflexible and unsuitable for merger control purposes. This affects the effectiveness of the review process, the gathering of relevant information, the discussion of possible concerns and contemplated remedies. A reformed merger control regime in Chile should ensure fairness by adopting the following procedural improvements:
  - Chile’s merger review procedure should have a *collaborative nature* to ensure effectiveness, robustness and celerity of the review process. A collaborative process means that the Parties should be given the opportunity to consult with the enforcer at key stages of the investigation regarding any legal or practical issue that may arise during the investigation.<sup>266</sup> The enforcer should also provide sufficient and timely information about its competition concerns; and the Parties should be given the opportunity to respond to such concerns.<sup>267</sup>
  - Fairness requires transparency in the *decisional process*, including the obligation on the part of the enforcer to motivate not only its final decision, but also procedural decisions that bear an impact on the review process. This requires that the enforcer provide the Parties with timely explanations as to (i) why it may decide to open an in-depth Phase II review, and (ii) why remedies or even a prohibition may be contemplated.
  - Regarding *remedies* in particular, an on-going and open dialogue with the Parties may be the most efficient tool to ensure the relevance and viability of the remedies, and to avoid subsequent legal challenges.<sup>268</sup> The Parties must know how and when they can

<sup>266</sup> OECD Merger Recommendation, article I.A.4. and ICN Recommended Practices, article VI.B. Key stages include e.g. the decision to open a Phase II review, to conclude on potential anti-competitive effects, or to consider remedies.

<sup>267</sup> OECD Merger Recommendation, article I.A.3. This could be done, for example, by encouraging or compelling the enforcer to schedule state-of-play meetings at key procedural stages. For further developments and country experiences on procedural fairness towards the parties, see OECD, Policy Roundtables on “Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings”, op. cit.

<sup>268</sup> ICN Recommended Practices, article XI.B. Certain jurisdictions, e.g. the European Union, provide for a specific form (“Form RM”) to be filed by the parties willing to

proactively put remedies forward in the review process and propose alternative solutions to the remedies or prohibition envisaged by the enforcer.<sup>269</sup>

- **Third parties' rights:** Chile's current procedures leave room for third parties' opportunistic actions. Under an effective *ex ante* merger control system, only the Parties should be empowered to start the merger review process with a notification or the enforcer with *ex officio* powers. Third parties' rights should be limited to expressing their views on a merger under review and to informing the enforcer of any un-notified and reportable merger.<sup>270</sup>
- **Transparency:** Overall transparency in the process plays a key role in ensuring consistency, predictability and fairness in the review process.<sup>271</sup> Chile's law should therefore make all rules, guidelines, decisions and material relevant to merger review available to the public in a timely manner. Transparency is essential towards the Parties and society, e.g. to allow for public scrutiny and to enable third parties to provide useful and timely comments.
- **Confidentiality:** The need for fair and transparent procedures must be balanced with the need to protect confidential and privileged information received at any stage of the review process.<sup>272</sup> "*Public disclosure of business secrets and other confidential information received by competition agencies in connection with the merger review process may prejudice important commercial interests and may have*

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formally submit remedy proposals: see Annex IV to the Commission Regulation (EC) No 1033/2008 of 20 October 2008 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:279:0003:0012:EN:PDF>.

<sup>269</sup> ICN Recommended Practices, article XI.A.

<sup>270</sup> Ibid., article I.A.5: "*Third parties with a legitimate interest in the merger under review, as recognised under the reviewing country's merger laws, should have an opportunity to express their views during the merger review process*".

<sup>271</sup> ICN Recommended Practices, article V.A. For further developments and country experiences on transparency requirements, see OECD, Policy Roundtables on "Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings", op. cit.

<sup>272</sup> OECD Merger Recommendation, article 1.A.7 and ICN Recommended Practices, article VIII.A.

*adverse effects on competition*”.<sup>273</sup> This balance may be drawn by requiring the reviewing authority to publish, at key stages of the review process, non-confidential versions of its main findings to allow for public scrutiny and third parties’ reaction.

**Timing and scope of merger review powers.** Two key questions arise and should be addressed as part of any merger review policy: first, can the merger review process be opened towards un-notified mergers?<sup>274</sup> Second, could merger control also take place post-consummation (*ex post*)?

- Whether in a mandatory, voluntary or hybrid notification system, un-notified mergers may under certain circumstances raise competition concerns. Merger control policy should clarify whether these transactions could nevertheless be reviewed *ex officio*. If so, the merger or market circumstances under which such review can take place should be clearly established, so as to enable the Parties to assess the risk surrounding their un-notified merger. If the enforcer enjoys such *ex officio* powers, the parties should be granted the correlative possibility to voluntarily notify their merger even below the thresholds, to obtain certainty over their merger.
- A policy choice should also be made regarding the time limit to exercising merger review powers: in other words, until when can a merger review process take place and in particular can merger control powers be exercised post-consummation? As a general rule, most merger control jurisdictions have adopted a pre-merger review system and do not provide for *ex post* merger review. If competition issues arise post-merger, antitrust enforcement remains possible (against e.g. a restrictive agreement or an abuse of dominance).<sup>275</sup> Should *ex post* merger control enforcement remain possible, merger control rules may limit this possibility in time.<sup>276</sup>

<sup>273</sup> ICN Recommended Practices, article IX.A; see also OECD Merger Recommendation, articles I.A.7 and I.B.3.

<sup>274</sup> Either because they fall below the notification threshold in a mandatory notification system, or because the Parties concluded that notification was not necessary in a voluntary system.

<sup>275</sup> The law should make clear that merger clearance does not absolve the merged entity of future liability for antitrust infringements.

<sup>276</sup> In the United Kingdom for example, the OFT can refer a merger to the CC (both the OFT and the CC are part of the CMA since April 2014) up until four



### Summary: Merger review powers and procedures

- The current absence of a merger-specific review process and the co-existence of various procedures have led to inefficiency and uncertainty in Chile's merger control. A reform of Chile's merger control regime should improve the procedure for merger review and streamline the FNE's and TDLC's respective merger review powers.
- Chile's enforcement landscape is characterised by a dual enforcement system with shared powers between the TDLC and the FNE. Both are qualified bodies and can offer strengths to the merger control system but this dual structure should not add complexity or undue delay to the merger control process.
- Merger control procedures and powers should ensure that mergers are reviewed in an efficient, effective, predictable and timely manner at all stages of the review process. Therefore improving the merger review process in Chile requires the following:
  - i. To set up a streamlined two-phase merger review procedure, along two possible options:
    - *Option 1*: Phase I with the FNE and phase II with the TDLC;
    - *Option 2*: Phases I and II with the FNE and entrusting the TDLC with the judicial review on appeal of the FNE's decisions. This second option may provide for enhanced effectiveness, timeliness and efficiency in the review process.
  - ii. Whether the decision-making process lies with the FNE and/or the TDLC, to improve and guarantee procedural efficiency and fairness in merger reviews, namely:
    - *Merger review periods* should be established and respected: Phase I review should be completed within a specified period (maximum 6 weeks), whereas Phase II should be conducted within a determinable time frame (maximum 6 months from notification).
    - The *merging parties' rights* should be guaranteed, including a collaborative process, transparency and dialogue at key stages of the process, open and timely remedy discussions, and non-discrimination.
    - Both *transparency and confidentiality* must be ensured: transparency must be balanced with the protection of confidential information received in the review process.
- Each merger control policy should address two key questions as part of its overall competition enforcement policy: can the merger review process be opened towards un-notified merger, and could merger control also take place post-consummation?

months following the consummation of the merger. In Canada, closing before clearance may not only be sanctioned with fines but also trigger *ex post* merger review by the Commissioner for Competition, who can seek remedies or the dissolution of the merger up until one year from its consummation.

## 5. Substantive merger analysis

### 5.1 Issues

The substantive test adopted by the FNE and the TDLC for merger control purposes is not an issue in itself, since both the FNE and the TDLC have developed an effect-based test – closer to the substantial lessening of competition (“SLC”) test than to the dominance test – generally taking into account the merger’s unilateral and co-ordinated effects on the relevant markets, and giving consideration to efficiencies where proven. Transparency of the FNE and the TDLC’s substantive analysis is provided through the publication of their merger reports and merger case law respectively. The following aspects however weaken the effective application of the substantive test in Chile’s current merger reviews:

- **Lack of legal basis and guidance:** Chile’s law is silent on the substantive test applicable to mergers. Absent a legal merger-specific test, the FNE and the TDLC can only rely on article 3 of the Competition Act (“may tend to have anticompetitive effects”). In addition, very limited guidance is provided in soft law sources: the FNE Merger Guidelines indicate to some extent what factors are relevant in conducting the substantive analysis of the merger. However, these guidelines are not binding and their scope is limited to horizontal mergers. The TDLC Decree on Concentrations indicates what information must be provided as part of a merger consultation (under article 18 (2) of the Competition Act) but with no clear substantive test, nor guidance for adversarial review procedures (under article 18 (1)) or settlement approval procedures (under article 39 ñ). Furthermore, there is no mechanism to ensure a coherent substantive approach between the FNE and the TDLC, each of which can adopt its own test and apply it at its own discretion on a case-by-case basis.
- **No substantive safe harbour:** First, there is no transparent or predictable safe harbour (*de minimis* rule), such as market share benchmarks, provided by Chile’s merger law or the TDLC practice. Therefore, there is no possibility for the Parties to know with reasonable certainty when a merger will likely be examined, or will qualify for expedited examination and clearance. Second, the FNE Merger Guidelines lay down HHI-based thresholds, below which the FNE is unlikely to closely investigate a merger. Such thresholds do

not apply to the TDLC and may only apply to horizontal mergers coming to the FNE's knowledge.

- **Lack of information-gathering power:** Both enforcers acknowledge that it is challenging in practice to collect relevant information, especially reliable quantitative data, to conduct their substantive analysis. The FNE and the TDLC lack effective powers to compel the Parties or third parties, including experts, to respond fully and accurately to requests for information.<sup>277</sup> Consequently, the substantive analysis relies excessively on the Parties' goodwill and on their discretionary provision of information, as well as on the enforcers' own efforts to compute relevant data where available.

## 5.2 *Assessment and Recommendations*

The purpose of the substantive merger analysis “*is to identify and prevent or remedy only those mergers that are likely to harm competition significantly*”.<sup>278</sup> The following improvements should be considered in drawing Chile's substantive test to determine mergers' impact on competition:

- While the SLC test is in line with most jurisdictions,<sup>279</sup> the substantive test for merger control should be set by law so that companies can determine with sufficient certainty how the agency will assess the merger effects. In addition, guidance should be provided regarding the factors taken into account by the enforcer to conduct the substantive test: what qualitative and quantitative factors are relevant or determinative, how the substantive analysis may vary between horizontal, vertical and conglomerate mergers, etc.<sup>280</sup> Such guidance

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<sup>277</sup> See *infra* section 6 on “sanctions” for further details on compelling measures.

<sup>278</sup> ICN Recommended Practices for Merger Analysis, <http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf>, (hereinafter, the “ICN Substantive Practices”) article I.A.

<sup>279</sup> OECD Roundtable on “Standard for Merger Review with a particular emphasis on country experience with the change of merger review standard from the dominance test to the SLC/SIEC test” (2009), 10 May 2010, DAF/COMP(2009) 21, <http://www.oecd.org/daf/competition/mergers/45247537.pdf>.

<sup>280</sup> In addition to horizontal (unilateral and co-ordinated) effects, vertical and conglomerate (portfolio) effects should be described to the extent they may give rise to competition concerns.

may be best set through guidelines or notices or even in the explanatory notes of a notification form model.<sup>281</sup>

- Certain mergers are subject to notification despite the fact that they do not give rise to competition concerns. This is notably the case of mergers that exceed the notification thresholds (e.g. companies with a high turnover in Chile) but that maintain post-merger market concentration levels and market shares low enough to not raise any concern. In such cases, expedited review and clearance should be available, together with a simplified notification form and process.<sup>282</sup> The possibility of a short-form notification is available in the majority of OECD countries.<sup>283</sup> To that end, Chile's substantive rules could include a *de minimis* threshold, a.k.a. substantive threshold or safe harbour, below which a merger qualifies for fast-track clearance. Such

<sup>281</sup> As mentioned before, if both the FNE and the TDLC exercise merger review powers, the law may encourage or impose that a common set of guidelines be adopted so as to avoid discrepancies in the substantive analysis of one and the same merger at various stages of the review process.

<sup>282</sup> In the European Union, models for the full notification (Form CO) and short notification (Short Form CO) are annexed to Commission Regulation (EC) No 1033/2008 of 20 October 2008 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:279:0003:0012:EN:PDF>. Regarding expedited reviews, see the European Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, 14 December 2013 (2013/C 366/04), [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52013XC1214\(02\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52013XC1214(02):EN:NOT).

<sup>283</sup> Namely in approximately 60% of OECD Member countries. These procedures allow for a faster review process but also for limited information to be provided by the Parties. OECD, Secretariat Note, *Implementation of the 2005 OECD Recommendation on Merger Review*, op. cit., section 3.2., pt. 22. This substantive thresholds is distinct from notification thresholds: notification thresholds determine which mergers will be notified (without prejudice to the merger's effects), whereas substantive thresholds help determine whether the merger's effects will be deemed unproblematic or rather require additional scrutiny.

a safe harbour is commonly based on market share or market concentration levels.<sup>284</sup>

- Most jurisdictions conduct their substantive analysis in light of various factors – including often a strong reliance on market share and market concentration levels. The definition of relevant competition markets is therefore critical. To that end the “hypothetical monopolist” or “SSNIP” test is widely recognised as an appropriate test to delineate relevant markets.<sup>285</sup> Clear and coherent guidance should be provided as to how relevant product and geographic markets ought to be defined.<sup>286</sup>
- The competition authority should be in a position to substantively assess the merger on the basis of the information in the notification form. The notification form should specify clearly and objectively the type of information required for the substantive assessment; the level of information required may vary between affected and unaffected relevant markets.<sup>287</sup>
- Finally, there is no point in having a legal merger control regime, streamlined procedures, enhanced merger review powers and a clear substantive test, if the enforcer cannot have access to reliable

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<sup>284</sup> ICN Substantive Practices, article III.B. *De minimis* criteria should be provided not only for horizontal merger (e.g. post-merger combined market share and market share differentials in overlap markets), but also for vertical and conglomerate mergers (e.g. market share in vertically related markets or in complementary or unrelated markets).

<sup>285</sup> For further recommendations re: the definition of relevant markets, including the SSNIP test, see ICN Substantive Practices, article II.

<sup>286</sup> In addition, certain jurisdictions distinguish between “relevant” and “affected” markets for purposes of the substantive merger analysis: affected markets are relevant markets on which the Parties’ market shares exceed a certain level. Affected relevant markets generally trigger a complete substantive analysis, whereas unaffected relevant markets may qualify for *de minimis*, as explained above, and benefit from an expedited review. Under the TDLC Decree on Concentrations, both relevant and affected terms are used but with no distinction between the two.

<sup>287</sup> The OECD has issued a Framework for a Notification and Report Form for Concentrations: see the Appendix to the OECD Report on “Notification of Transnational Mergers”, 23 February 1999, DAF/CLP(99)2/FINAL, <http://www.oecd.org/daf/competition/mergers/2752153.pdf>.

information to conduct the substantive analysis. The OECD recommends that government “*ensure that the review process enables [its] competition authorities to obtain sufficient information to assess the competitive effects of a merger*”.<sup>288</sup> To that end, the law should entrust the Chilean enforcers with sufficient tools and powers (including sanctions for lack of co-operation) to obtain information needed from the Parties, experts and third parties.

#### **Summary: Substantive merger analysis**

- The substantive test adopted and conducted by the FNE and the TDLC (close to the SLC test) does not pose a problem as such, but it should be set by law.
- What is not set by law, should be established by guidelines applicable to both the FNE and the TDLC to ensure consistency in merger enforcement.
- Clear guidance should be provided as to the qualitative and quantitative factors relevant to the substantive analysis, and how the analysis may vary between horizontal, vertical and conglomerate mergers.
- Expedited review and clearance should be available for notified mergers that are unlikely to raise concerns: guidance is required as to which mergers can benefit of the expedited review.
- Notification forms (long form for full reviews and short form for expedited reviews) should specify clearly and objectively the type of information required for purposes of the substantive assessment.
- Enforcers must be granted the powers necessary to collect and to compel the provision of complete and accurate information for an effective review of mergers.

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OECD Merger Recommendation, article I.A.1.1.

## 6. Sanctions and enforcement tools

### 6.1 Issues

The Competition Act only provides for sanctions against anticompetitive acts, facts or agreements. Such sanctions, laid down in article 26 of the Competition Act, can only be requested and imposed in an adversarial procedure, which is rarely used in the merger context.<sup>289</sup> There are no sanctions to ensure the effectiveness, timeliness and robustness of the merger review process as such, regardless of whether the merger is pro- or anti-competitive. Currently, only a sanction of imprisonment is available against the obstruction of the FNE investigation, which requires that a separate procedure be lodged by the enforcer in criminal court.<sup>290</sup> Similarly, non-compliance with merger remedies can only be sanctioned following a separate infringement procedure to be lodged by the FNE before the TDLC.

### 6.2 Assessment and Recommendations

Sanctions against violations of merger control rules and decisions represent a strong deterrent from non-compliant behaviours and provide a strong signal to the public, including the Parties and third parties, that merger rules are effective and enforceable.

A reform of Chile's merger control regime should therefore set forth a framework of sanctions and enforcement tools along the following lines:

- *Failure to notify a reportable merger* (especially under a mandatory or hybrid notification system): The enforcer should be entitled to impose a fine or periodic penalty for failure to notify.<sup>291</sup>

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<sup>289</sup> Most merger reviews are conducted in Chile through the FNE review process or through the TDLC consultation procedure, none of which allow for the sanctions foreseen by article 26 (c) of the Competition Act.

<sup>290</sup> Article 42 of the Competition Act. This sanction has never been resorted to: criminal sanctions are perceived as ill-suited in the merger context, and the need to lodge a distinct procedure in criminal court may be a burdensome and lengthy process.

<sup>291</sup> Such sanctions may be of administrative nature and imposed by the enforcer itself. For numerical examples: penalties for failure to notify amount to US\$ 16.000 per day in the United States, up to US\$ 20.000 per day of delay in Japan, up to 10% of the companies' aggregate worldwide turnover if they intentionally or negligently failed to notify in the European Union, up to 10% of the companies' (domestic) turnover plus notification injunctions in South Africa.

- *Consummation of a merger under review* (“gun jumping”): The law may impose a fine to punish breach of the waiting periods by the Parties, i.e. the violation of the suspensory effect of the merger review process. A sanction against gun jumping is meant to preserve the effectiveness of the review process; it does not prejudge the merger as such.<sup>292</sup>
- *Obstructing the information gathering and review process*: Companies and individuals, including the Parties and third parties, whether private or public, should respond accurately and timely to requests for information from the enforcer. Such requests should set a clear deadline to respond. Failure to respond and incomplete, inaccurate or misleading responses can be sanctioned by pecuniary fines, including the possibility of periodic penalties until the addressee complies.
- *Non-compliance with remedies*: Remedies are imposed where the merger is deemed to give rise to anticompetitive effects absent such remedies. Therefore, if remedies are not complied with, there should be no need for another review (as it is the case under Chile’s current system): the merger *is* anticompetitive if remedies are not implemented. The law should provide for monitoring mechanisms and entrust the enforcer with the power to sanction non-compliance with remedies, including the possibility of periodic penalties to compel compliance.

#### **Summary: Sanctions and enforcement tools**

- For the merger control regime to be effective, it is necessary to foresee sanctions against non-compliance:
  - Towards the *merging parties*, sanctions should be available against: failure to notify a reportable merger, gun jumping, obstructing the review process e.g. by the provision of incomplete or inaccurate information, and non-compliance with remedies.
  - Towards *third parties*, sanctions should be available for obstructing the review process e.g. by failure to respond to an information request or by the provision of incomplete or inaccurate information.
- As to the nature of the sanctions, they may consist in pecuniary fines combined with affirmative orders and/or periodic penalties. The law should make clear whether sanctions are administrative or criminal, and whether they apply to companies and/or to individuals.

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In various jurisdictions, such as France, Japan and the European Union, the sanction for gun jumping is the same as for failure to notify.



## Conclusion

This Report has analysed key issues arising from Chile's current merger control system and provided recommendations for improvement in light of OECD recommendations and other international best practices.

A number of essential aspects of merger control require amendments of Chile's law in order to establish an effective, efficient and transparent merger control regime. These essential aspects are summarised in the diagrams below:

### ESTABLISH MERGER CONTROL JURISDICTION

1. Define **mergers** for purposes of merger control = Which transactions fall under Chile's merger control jurisdiction.
2. Select a **notification mechanism** = How notifiable mergers are actually notified, i.e. coming to the enforcer's attention. Notification can be mandatory, voluntary or hybrid. In light of the pros and cons of each system and given Chile's experience, a mandatory or hybrid mechanism may prove more effective.
3. Determine **notification thresholds** = Which of the caught mergers will actually be subject to notification, hence to merger review.



### MERGER REVIEW POWERS AND PROCEDURES

1. Set up a streamlined and effective **two-phase merger review procedure**:
  - *Option 1: Phase I with the FNE and phase II with the TDLC;*
  - *Option 2: Phases I and II with the FNE and judicial review by the TDLC on appeal.*
2. Satisfy **fairness conditions** in merger control reviews, at both FNE and TDLC level.
3. Establish clear review periods (time limits), a more transparent and collaborative process with the merging parties, and ensure consistency of the merger review process between the FNE and TDLC.
4. Clarify the timing and scope of **merger control powers**. Chile's merger policy should e.g. determine whether merger control could extend to un-notified merger, and whether it may also occur post-merger.

These reforms would allow mergers to be selected, notified and reviewed in a timely, effective and predictable fashion to the benefit of consumers and economic efficiency. The goal of merger control is to assess the impact of mergers on competition. To that end, a merger control reform should include a clear substantive test under which the competition impact of reviewed mergers will actually be assessed. A reform should also consider introducing appropriate sanctions to ensure that merger control rules and procedures are effective.



## ANNEX. TDLC AND FNE MERGER REVIEWS

TDLC merger cases	Transaction type	Procedure type	Procedure by	Pre- or post-merger Outcome	Remedies imposed by	Procedure length	Ruling date	Industry
1. Metropolis Intercom/VTR	Merger	Consultation	Merging parties	Before	Remedies	TDLC ruling Confirmed by SC <sup>(1)</sup> 318 days TDLC 125 days SC 443 days total	25.10.2004 TDLC 10.3.2005 SC	Telecom
2. Telefonica Moviles/BellSouth	Acquisition	Consultation	Merging parties	Before	Remedies	TDLC ruling Confirmed by SC 231 days TDLC 179 days SC 410 days total	4.1.2005 TDLC 15.7.2005 SC	Telecom
3. GLRChile/Iberoamerica n Radio Chile	Acquisition	Consultation	Merging parties	Before	Remedies	TDLC ruling Confirmed by SC 217 days TDLC 104 days SC 321 days total	27.7.2007 TDLC 22.11.2007 SC	Telecom (radio)
4. Endesa/Colbun	J.V.	Consultation	Merging parties	Before	Remedies	TDLC ruling 520 days TDLC	19.10.2007 TDLC	Energy (electricity)
5. ING/Basantander	Acquisition	Consultation	Merging parties	Before	Remedies	TDLC ruling 161 days TDLC	4.1.2008 TDLC	Insurance
6. D&S/Falabella	Merger	Consultation	Merging parties	Before	Prohibition	N/A 238 days TDLC	31.1.2008 TDLC	Retail credit, real estate
7. SQM Comercial/Anagra	Acquisition	Consultation	Merging parties	Before	Remedies	TDLC ruling Confirmed by SC 336 days TDLC 231 days SC 567 days total	9.12.2009 TDLC 10.8.2010 SC	Fertilisers
8. Ecomarkel/Rendite-Fnos	Acquisition	Consultation	FNE	Before	Withdrawn	N/A (237 days)	3.1.2011 TDLC	Supermarkets
9. Cencosud/Condell	Acquisition	Consultation	Merging parties	Before	Approval	TDLC ruling 145 days TDLC	21.1.2011 TDLC	Supermarkets
10. Avisa/D&S	Acquisition	Consultation	FNE	Before	Withdrawn	N/A (159 days)	2.3.2011 TDLC	Supermarkets
11. COPEC/Terpel	Merger	Consultation	Merging parties	After	Remedies	TDLC ruling 338 days TDLC	26.5.2011 TDLC	Fuel
12. GTD Grupo Teleductos/Entel	Merger	Consultation	FNE	Before	Withdrawn	N/A (25 days)	24.1.2012 TDLC	Telecom
13. LAN/TAM	Acquisition	Consultation	Third party (consumer association)	Before	Remedies	TDLC ruling Confirmed by SC 237 days TDLC 185 days SC 422 days total	26.4.2012 TDLC 2.1.2013 SC	Air transport
14. Quinenco (Shell)/Terpel	Merger	Consultation	Merging parties	Before	Prohibition (TDLC) Remedies (SC)	SC ruling 168 days TDLC 237 days SC 405 days total	26.4.2012 TDLC 2.1.2013 SC	Fuel

TDL/C merger cases	Transaction type		Procedure type		Procedure by		Pre- or post-merger		Outcome		Remedies imposed by		Procedure length		Ruling date		Industry	
	Acquisition	Merger	Consultation	Consolidation	Merging parties	FNE	Before	After	Approval	Remedies	TDL/C ruling	TDL/C ruling	98 days TDLC	175 days TDLC	4.8.2012 TDLC	27.9.2012 TDLC		Supermarkets
15. Cencosud/Abbaartal		Merger	Consultation	Consolidation	Merging parties	FNE	Before	Before	Approval	Remedies	TDL/C ruling	TDL/C ruling	98 days TDLC	175 days TDLC	4.8.2012 TDLC	27.9.2012 TDLC	Supermarkets	
16. Radiodifusión SpA		Merger	Consultation	Consolidation	Merging parties	FNE	Before	Before	Remedies	Remedies	TDL/C ruling	TDL/C ruling	499 days TDLC	262 days SC	12.12.2012 TDLC	30.9.2013 SC	Telecom (radio)	
17. SMU/SDS		Merger	Consultation	Consolidation	Merging parties	FNE	After	After	Remedies	Remedies	TDL/C ruling	TDL/C ruling	499 days TDLC	262 days SC	12.12.2012 TDLC	30.9.2013 SC	Retail	
18. Chile Films IVM/Hoyts Cinemas		Acquisition	Adversarial	Adversarial	FNE	FNE	After	After	Remedies	Remedies	Judicial conciliation approved by TDL/C	Judicial conciliation approved by TDL/C	188 days TDLC	188 days TDLC	15.1.2013 TDLC	15.1.2013 TDLC	Cinema	
19. Nestlé/Pfizer		Acquisition	Settlement submission	Settlement submission	FNE/Merging parties	FNE/Merging parties	Before	Before	Remedies	Remedies	Extra-judicial settlement approved by TDL/C	Extra-judicial settlement approved by TDL/C	(47 days)	(47 days)	18.4.2013 TDLC	18.4.2013 TDLC	Food & drugs	
<b>FNE merger investigations</b>	<b>Total opened investigations</b>		<b>Initiated by</b>		<b>Submitted by</b>		<b>FNE to TDL/C</b>											
Years 2007 – 2011 <sup>(2)</sup>	66		<i>Ex officio</i>		3 consultations (Ecomarket; Alvi; Entel)													
Year 2012 <sup>(3)</sup>	14		13 <i>ex officio</i> , 1 by merging parties		1 consultation (Radiodifusión); 1 adversarial (Cinema Hoyts)													
Year 2013	24		22 <i>ex officio</i> , 2 by merging parties		1 settlement (Nestlé/Pfizer)													

(1) SC = Supreme Court.

(2) No statistics are available before 2007.

(3) The FNE Merger Unit was created in 2012.

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